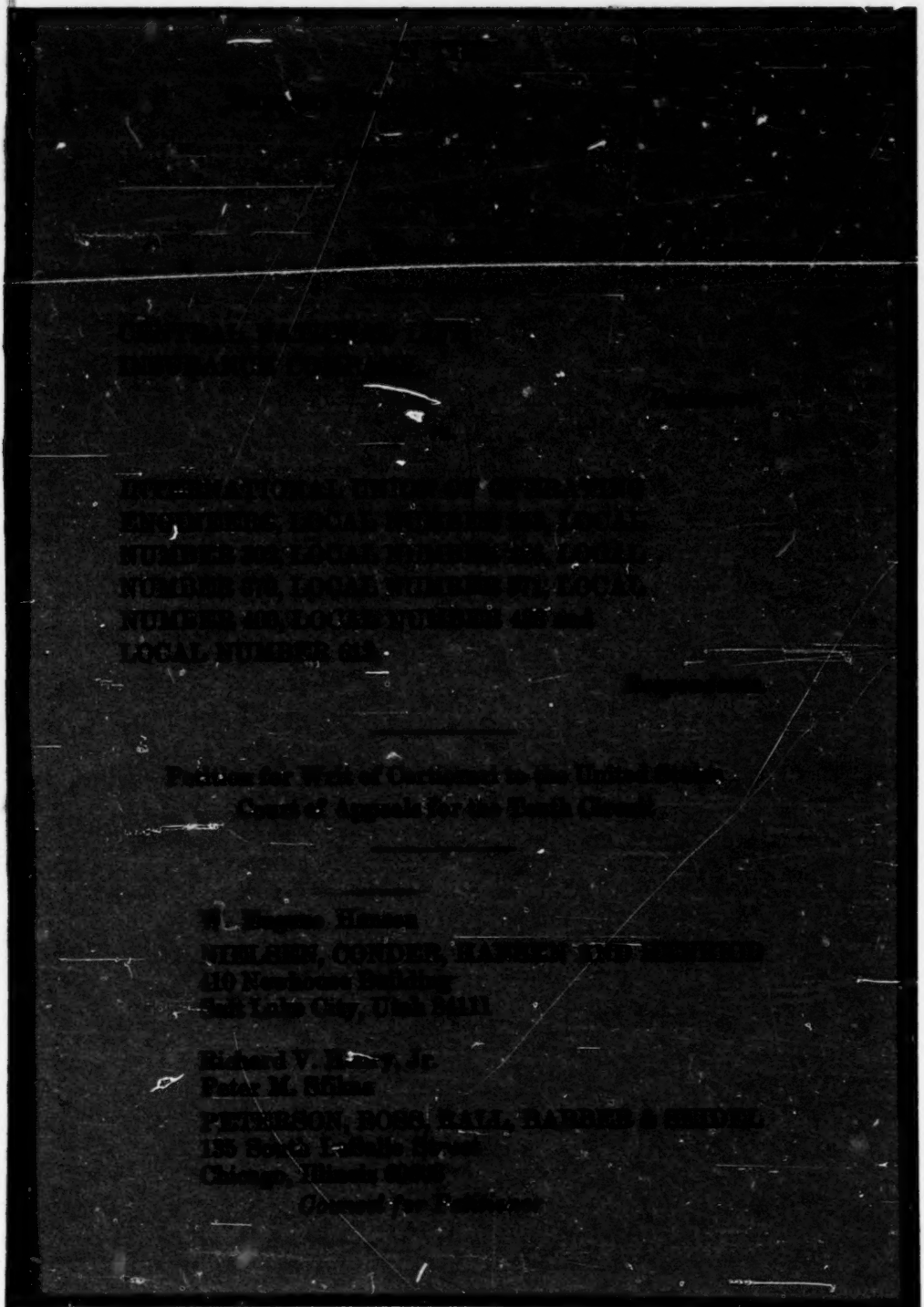

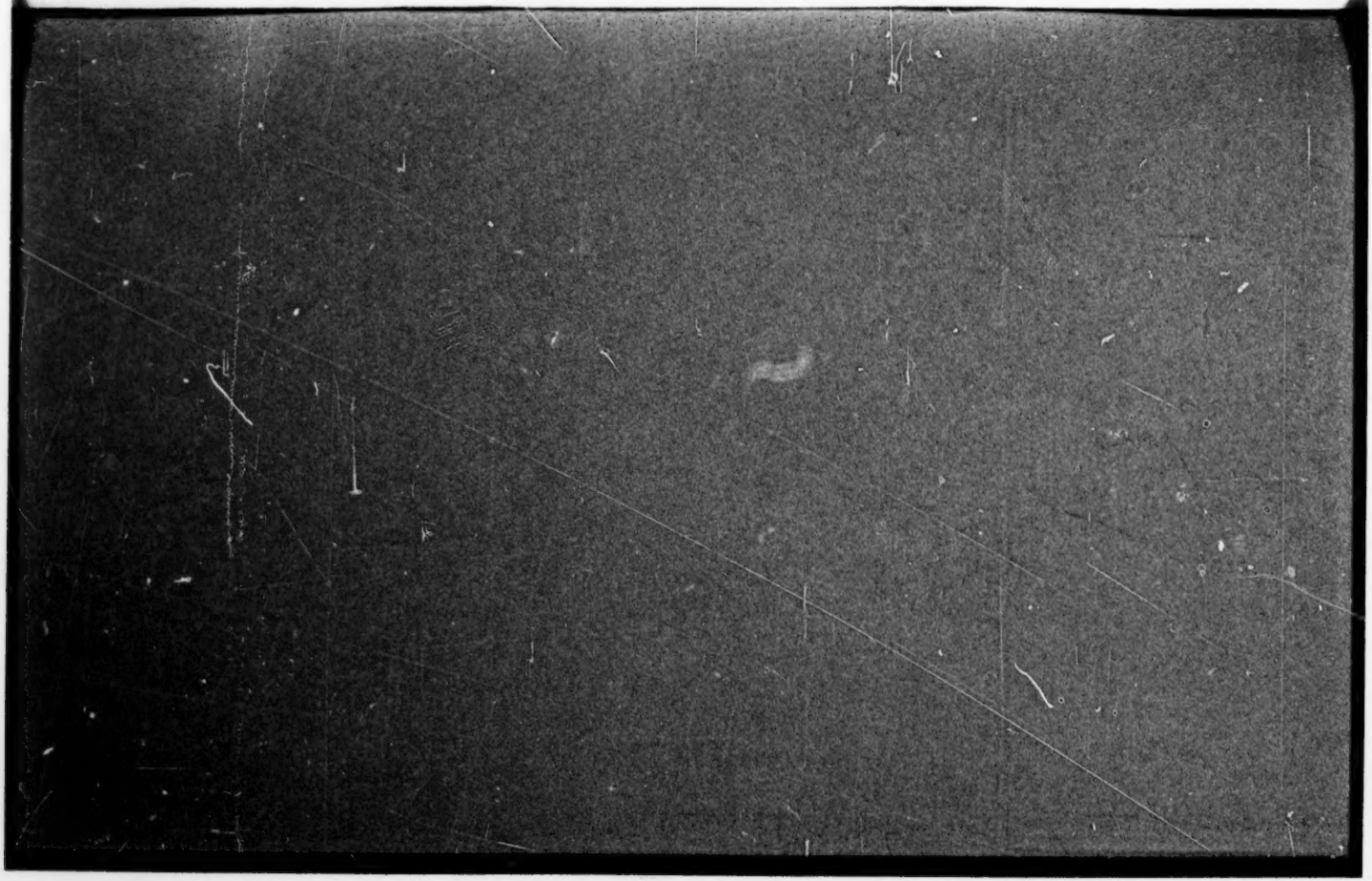

SUBJECT INDEX

Page

I.

OPINIONS BELOW 2

II.

JURISDICTION 2

III.

QUESTIONS PRESENTED 2

IV.

STATUTES INVOLVED 3

V.

STATEMENT 4

VI.

REASONS FOR GRANTING THE WRIT 8

VII.

CONCLUSION 21

INDEX TO APPENDICES

Appendix A. Findings of Fact, Conclusions of Law, and Judgment of the United States District Court for the District of New Mexico 23

Appendix B. Opinion of the United States Court of Appeals for the Tenth Circuit 39

Appendix C. Order of the United States Court of Appeals for the Tenth Circuit 51

Appendix D. Statutes Involved 52

Ill. Rev. Stat. ch. 73, §842(2)(c) 52

Ill. Rev. Stat. ch. 73, §842(2)(e) 52

Appendix E. Insurance Contract 55

Appendix F. Application 66

Appendix G. Addendum 69

Appendix H. Memorandum of Understanding 71

Page

INDEX OF AUTHORITIES

CASES

American Motorists Insurance Co. v. Thompson, 253 Or. 76, 453 P.2d 164 (1969) 8

Blanchard v. Jackson Funeral System Ass'n., 327 Ill. App. 290, 64 N.E.2d 201 (1945) 16

Bronson v. Washington National Insurance Co., 59 Ill. App.2d 253, 207 N.E.2d 172 (1965) 17

Coons v. Home Life Insurance Co., 368 Ill. 231, 13 N.E.2d 482 (1938) 16

Crutchfield v. Continental Assurance Co., 336 Ill. App. 411, 84 N.E.2d 333 (1949) 16

Franey v. State Farm Mutual Automobile Insurance Co., 5 Ill. App.3d 1040, 285 N.E.2d 151 (1972) 16

Harris v. Universal Underwriters, Inc., 37 Ill. App.2d 367, 185 N.E.2d 704 (1962) 16

International Union of Operating Engineers, Local 701 v. Central National Life Insurance Co., 519 P.2d 85 (Or. 1974) 7

Konrad v. Hartford Accident & Indemnity Co., 11 Ill. App.2d 503, 137 N.E.2d 855 (1956) 16

Lumbermen's Mutual Insurance Co. v. Slide Rule & Scale Engineering Co., 79 F. Supp. 394 (S.D. Ill. 1948) 16

McFarlain v. Pilot Life Insurance Co., 254 So. 2d 506, (La. App. 1971) 9

Midwest Triangle Paint Works v. Firemen's Fund Insurance Co., 36 Ill. App.2d 65, 183 N.E.2d 562 (1962) 19

Morris v. Central West Casualty Co., 351 Ill. 40, 183 N.E. 595 (1932) 16

Moscov v. Mutual Life Insurance Co., 387 Ill. 378, 56 N.E.2d 399 (1944) 16

Page

Whitney v. Continental Life & Accident Co., 89 Idaho 96, 403 P.2d 573 (1965) 8

Zitnik v. Burik, 395 Ill. 182, 69 N.E.2d 888 (1946) 17

STATUTES

Illinois Insurance Code, Ill. Rev. Stat. ch. 73, §842(2)(e) 2

Illinois Insurance Code, Ill. Rev. Stat. ch. 73, §842(2)(c) 3

Louisiana Insurance Code, La. Rev. Stat. §22:175 A(2) 10

28 U.S.C. §1254(1) 2

28 U.S.C. §1332 7

28 U.S.C. §1446 7

29 U.S.C. §152(5) 4

SECONDARY AUTHORITIES

R. Eilers and R. Crowe, Group Insurance Handbook (1965) 3

22 Illinois Law and Practice, Insurance (1956) 16

IN THE

Supreme Court of the United States

October Term, 1974

No.....

CENTRAL NATIONAL LIFE INSURANCE COMPANY,

Petitioner,

vs.

INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL NUMBER 953, LOCAL NUMBER 302, LOCAL NUMBER 326, LOCAL NUMBER 370, LOCAL NUMBER 371, LOCAL NUMBER 400, LOCAL NUMBER 428 and LOCAL NUMBER 612,

Respondents.

Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

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To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States of America:

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Tenth Circuit entered in the above case on July 30, 1974.

I.

OPINIONS BELOW

A copy of the Findings of Fact, Conclusions of Law and Judgment of the United States District Court for the District of New Mexico (unreported) is attached to this petition as Appendix A. A copy of the Opinion of the United States Court of Appeals for the Tenth Circuit, reported at 501 F.2d 902, is attached hereto as Appendix B.

II.

JURISDICTION

The opinion of the United States Court of Appeals for the Tenth Circuit affirming the judgment of the United States District Court for the District of New Mexico against petitioner in the aggregate amount of $563,865.16 plus interest and costs was entered on July 30, 1974. Petitioner timely filed a Petition for Rehearing which petition was denied on August 27, 1974. (A51) The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

III.

QUESTIONS PRESENTED

This is a breach of contract case in which petitioner contends that the lower courts decided an important state question directly contrary to applicable state law. The case presents issues of national importance since it directly involves the legal effect of Section 842(2)(e) of the Illinois Insurance Code which regulates the Illinois insurance industry. Ill. Rev. Stat. ch. 73, §842(2)(e) (1973). This sec-

tion is representative of regulatory provisions found in the insurance codes of many states. See R. Eilers & R. Crowe, *Group Insurance Handbook* 86-87 (1965).

The language in Ill. Rev. Stat. ch. 73, §842(2)(e) relied on by petitioner and expressly incorporated into the insurance contract with respondents requires that a group life insurance policy must insure at least 75% of the eligible members of each employer or union within the group. Notwithstanding this direct statutory reference, the trial court refused to follow Illinois precedent and erroneously reformed the contract thereby depriving petitioner of the protection of applicable state law. (See Finding of Fact No. 21; A27.) This erroneous position was subsequently affirmed on appeal. The questions thus presented for review are as follows:

1. Did the lower courts violate Illinois law by refusing to apply principles of statutory construction to an insurance contract which expressly incorporated statutory language regulating such contracts?

2. Did petitioner have the right pursuant to Illinois law to terminate the contract if 75% of the members of each local union in the group failed to enroll or remain insured under the policy?

3. Did petitioner expressly or impliedly waive its right pursuant to Illinois law to terminate the contract?

STATUTES INVOLVED

Sections 842(2)(c) and (e) of Chapter 73 of Illinois Revised Statutes are set forth in Appendix D.

V.

STATEMENT

Petitioner, Central National Life Insurance Company ("CNL"), is an Illinois legal reserve stock insurance company. (R 112.) Respondents, International Union of Operating Engineers Local Unions 953, 302, 326, 370, 371, 400, 428 and 612 ("Local Unions") are unincorporated associations and labor organizations as defined by 29 U.S.C. §152(5) having their principal places of business in the states of Arizona, Montana, New Mexico, Washington and Wyoming. (Finding of Fact No. 1, A23; R 83.) Western States Conference of Operating Engineers ("WCOE") is a voluntary unincorporated association of local unions including respondents organized for the purpose of assisting the locals in solving common problems such as obtaining group life insurance at reduced rates. (RT 93-94, 201, 339-40.) The case at bar arose in such a context.

In the latter part of 1970, numerous Local Unions affiliated with WCOE expressed an interest in obtaining group life insurance coverage under a single master group policy. (Finding of Fact No. 5, A24.) Pursuant to this objective, on or about January 15, 1971, representatives of Local Unions No. 3, 12, 302, 326, 370, 371, 400, 428, 612, 701 and 953, as well as numerous welder locals, met in Phoenix and granted approval for the President and Secretary of WCOE to execute a "Master Policy Agreement in behalf of WCOE" for group life insurance with CNL. (Finding of Fact No. 6, A24; RT 122, 224, 474.) The written application for the insurance which was signed by WCOE's President and Secretary included an Addendum which listed Local Union members of WCOE in 14 states and Guam. (R 117; A69.)

Paragraph 5 of the Application stated that the insurance would become effective on January 1, 1971, or as soon thereafter as "at least 75% of each Local Union of the eligible individuals" applied for coverage under the master policy. (R 116; A68.) The policy stated that the insurance would terminate automatically if less than 75% of the eligible employees were insured under the group. (R 114; A68.) In paragraph F of the Addendum, WCOE was given until July 1, 1971 to enroll the required 75%. (R 117; A70.) Upon receipt of the Application at CNL's office, it issued Master Group Policy No. MMG 1128 to WCOE. (R 112; A55.)

At some time in late November or early December, 1970 some of the Local Unions affiliated with WCOE furnished statistical information to WCOE's Secretary concerning the number and ages of their members. (RT 346, 447-48.) The information was subsequently turned over to a clerk in CNL's office who was directed to use the Lincoln National Life Insurance Company rate sheet and compute the premium rate for the group for which WCOE had made application. (RT 528, 727-28.) When the clerk made the computations, however, she made an error in the addition of the total premium and an error in the total number of persons to be insured. (Finding of Fact No. 37, A30.) Because of this mistake, CNL offered to issue the group life policy at a premium of 47¢ per $1,000 of life insurance per member per month, which rate was guaranteed for 3 years. (RT 515-22; Findings of Fact No. 13 and 14, A25.) Had WCOE provided CNL with complete statistical information, and if the computational errors had not been made, an actuarially sound premium rate of not less than 73.5¢ per $1,000 of life insurance per member per month would have resulted. (RT 843-48.)

CNL became aware in August, 1971, that less than 75% of the eligible employees of each Local Union affiliated with WCOE had enrolled under the policy and that death benefits paid exceeded premiums received by approximately 2 to 1. (RT 703.) CNL's general counsel was informed of this fact and directed to cancel the group. (RT 703-04.) Coverage was terminated by notifying those representatives of each Local Union whose names and addresses appeared on the premium reports. (Finding of Fact No. 22, A27; RT 705-06.)

At no time were 75% of the eligible members of each Local Union affiliated with WCOE or of the Local Unions which participated in approving the insurance program insured under the Master Group Policy. (Finding of Fact No. 19, A26.) Although 10 of the 11 Local Unions which originally authorized WCOE to apply for the policy eventually had 75% or more of their members enrolled, Local No. 3 was refused coverage on August 18, 1971, because it had only enrolled its retirees (2,200 of a total of 32,000 members) contrary to the terms of the Application. (RT 815-27.) The following day, the remaining Local Unions in the group were notified that Master Group Policy No. MMG 1128 was being terminated. (Finding of Fact No. 22, A27.)

On September 27, 1971, the attorney on retainer for WCOE went to CNL's office in Jacksonville, Illinois to seek a means of resolving the problem. (RT 404-07.) As a result of the ensuing discussions, a new premium rate of $1.00 per $1,000 of insurance was agreed upon and embodied in a Memorandum of Understanding between WCOE and CNL. (RT 409-16; Finding of Fact No. 26, A27.; A71.) Locals 953 and 701 refused to pay the higher

premiums specified by the Memorandum of Understanding and sought out successor coverage. (Finding of Fact No. 27, A28.) All other Local Unions paid the premium provided by the agreement through February, 1972. (Finding of Fact No. 27, A28.) No further premiums were paid by the Local Unions following said dates. Payment and acceptance of the additional premium in no way affected the rights of the parties under the basic contract. (Finding of Fact No. 35, A29.)

Following the termination by CNL, Local 953 purchased successor coverage from Hartford Insurance Company at 70¢ per $1,000 of life insurance per member per month (Finding of Fact No. 28, A28); all of the other respondents bought insurance from Safeco at $1.00 per $1,000 of life insurance per member per month. (Finding of Fact No. 29, A28.)

Local Union No. 953 subsequently filed an action for damages arising out of an alleged breach of contract of insurance based on CNL's notice of cancellation. The action was originally filed in the District Court of Bernalillo County, New Mexico, and was removed by CNL to the United States District Court for the District of New Mexico pursuant to 28 U.S.C. §1446. Jurisdiction below was based upon diversity of citizenship and an amount in controversy in excess of $10,000 exclusive of interest and costs. 28 U.S.C. §1332. (R 43.) Following removal, Local Unions No. 302, 326, 370, 371, 400, 428 and 612 were permitted to intervene. (R 83, 142.) Local Unions No. 3 and 12 did not file suit; Local Union No. 701 filed suit in the State of Oregon. See *International Union of Operating Engineers, Local* 701 *v. Central National Life Insurance Co.*, 519 P.2d 85 (Or. 1974).

Following trial without a jury, judgment was entered in favor of all plaintiffs (respondents herein) and against CNL on May 21, 1973. (A37.) On July 30, 1974, the United States Court of Appeals for the Tenth Circuit affirmed the judgment of the trial court. 501 F.2d 902.

VI.

REASONS FOR GRANTING THE WRIT

A. Public Interest.

This court should grant CNL's petition for writ of certiorari not only because of the unsettling impact the court of appeals' decision will have on Illinois insurance companies operating under established Illinois law, but also because of the impact the decision will have in other states. As petitioner has previously pointed out, the 75% requirement is found in the insurance codes of many states. *Group Insurance Handbook, supra* at 86-87. Such a requirement has been construed and upheld against the same kinds of arguments presented by respondents in the instant case. In *Whitney v. Continental Life & Accident Co.*, 89 Idaho 96, 403 P.2d 573 (1965), for example, several employers attempted to form an insurance group, but failed to enroll the required number by the end of the enrollment period. The Idaho Supreme Court held that the group did not qualify, that the subject policy was not issued, and that even if the policy had been issued, it "would not have met the mandatory legal requirements of the law." 403 P.2d at 578. The Idaho Supreme Court continued, "A contract prohibited by law is illegal and unenforceable." *Id.* A similar ruling was reached in *American Motorists Insurance Co. v Thompson*, 253 Or. 76, 453 P.2d.164 (1969), where it was held that if there is a conflict between statu-

tory provisions and the provisions of an insurance contract, the statutory provisions should prevail for reasons of public policy.

To the same effect is *McFarlain v. Pilot Life Insurance Co.*, 254 So. 2d 506 (La. App. 1971). In that case, suit was filed on a group life insurance policy issued by defendant to the Boiler Makers Local Union No. 79. Plaintiff was the widow of one of the members. She made a claim for benefits due her under the group policy. The effective date of the policy was August 1, 1970; plaintiff's husband died September 7, 1970; and on October 7, 1970 defendant notified the union that it would not issue the group policy applied for and returned all monies deposited with it by the union.

Defendant's position was based upon a condition in the application form upon which the issuance of a policy depended. That provision was as follows:

> . . . It is agreed that no insurance shall become effective until (a) the application shall have been approved by Pilot Life at its Home Office; (b) an initial premium shall have been paid; (c) if employees are to contribute toward the cost of their insurance, at least 75% (85% if less than 30 insured) of all eligible employees shall have made written request for the insurance; . . .

The union leadership and members were never told of the 75% enrollment requirement other than by its presence on the application form. Assurances were given to the union leadership by the general agent for defendant who solicited their insurance business and by the group resident manager of defendant that coverage was in effect as of August 1, 1970.

A Louisiana Statute, La. Rev. Stat. §22:175 A(2) (Supp. 1970), was in force at the time and was quoted in part by the court as follows:

> . . . A policy on which all or a part of the premium is to be derived from funds contributed by the insured employees may be placed in force only if at least seventy-five per cent of the then eligible employees, excluding any as to whom evidence of individual insurability is not satisfactory to the insurer, elect to make the required contributions. . .

In denying plaintiff's claim, the court stated (254 So. 2d 560 at 508):

> Clearly then, the requirement that 75% of the members of the Union be enrolled before the policy becomes effective is not merely a condition of the application, but is also a requirement of our law, and while the defendant may have waived the provisions of its application form, a point we do not decide, it could not have waived the provisions of the law. La. R.S. 22:3. Since there was never an enrollment even approximating 75% of the Union membership, therefore, no contract of insurance was ever confected and defendant is under no obligation to pay benefits for the death of plaintiff's husband.

Given the common use of percentage enrollment and participation requirements in state insurance codes regulating group insurance, the impact of the court of appeals' decision will be felt nationwide. Petitioner submits that inasmuch as this decision is based on an erroneous view of Illinois law, this Court should take action to correct it. There is no other way to remedy the error.

B. Fundamental Unfairness of Decision.

The opinion of the United States Court of Appeals for the Tenth Circuit in this case is fundamentally unfair to petitioner since it is based on a misunderstanding of the facts involved. On page 3 of the published opinion, for example, the court erroneously states that CNL "issued its group policy to the eight Locals who are the present plaintiffs, as well as to other Locals who are not parties to the present proceeding." 501 F.2d 902 at 904. (A41.) The fact is that the group policy was issued to WCOE upon submission of the WCOE Application in January of 1971 and *not* to the individual Locals. (A55.) The only reason why it may have appeared as if CNL were acting on a contract with the individual Locals was that the Addendum gave WCOE until July 1, 1971 to enroll 75% of the members of its Locals and provided that self-billing by each Local was acceptable. (A69.) As a consequence of this misunderstanding, the court adopted a contradictory position. Thus the court begins by stating that WCOE was authorized to "obtain for the interested locals a group life insurance policy" in order to secure a better group rate, but concludes by treating the contract as if made separately with each Local Union. 501 F.2d 902 at 904, 907. (A40, 47.)

This basic misunderstanding of the facts further led the court to erroneously assume that CNL disputed the lack of capacity of the 8 Local Unions to maintain the action. 501 F.2d 902 at 907. (A47.) The court states that such an argument is specious even though it was *never advanced* by CNL either at trial or on appeal. The argument that CNL did advance in Point I both of its Principal Brief and its Reply Brief was that WCOE lacked capacity to execute the Application for the group life insurance

policy and thus become the policy holder in the first instance. This significant issue of lack of capacity to contract was completely ignored.

The court's failure to deal with the fundamental facts in this case is evidenced elsewhere in its opinion. On the issue of mistake, for example, the court omits the fact that the statistical information submitted to CNL was incomplete and misleading in that only average ages for some union memberships were submitted. Even more importantly, on the 75% enrollment and participation issue, the court completely fails to even consider CNL's statutory argument regarding the proper construction of the contract under Illinois law. The statute itself is never mentioned. Such omissions and misunderstandings of the facts and issues in this case create additional justification for this Court to grant petitioner's application for a writ of certiorari.

C. Important State Question.

Beginning at the trial level, petitioner has strongly maintained that the insurance contract executed between CNL and WCOE was governed by Ill. Rev. Stat. ch. 73, §842(2)(e) (1973) which reads as follows:

> (2) The following forms of life insurance, in addition to those described in subsection (1), are hereby declared to be group life insurance within the meaning of this Article:
>
> (e) Life insurance, written under a policy issued to one or more trustees of a fund established by an association of employers on behalf of its members, or by two or more employers in the same industry or by one or more labor unions or by one or more employers and one or

more labor unions, which trustees shall be deemed the policyholder, covering employees of the employers or members of the unions for the benefit of persons other than the employers or the unions, subject to the following conditions:

(i) The persons eligible for insurance shall be all of the employees of the employers or all of the members of the unions, or all of any class or classes thereof determined by conditions pertaining to their employment, or to membership in the unions, or to both. The policy may provide that the term "employees" shall include retired employees . . .

(ii) The premium for the policy shall be paid by the trustee or trustees wholly from funds furnished by the employer or employers of the insured persons. Such funds may be derived, at the option of each employer, in part from contributions by the employees insured. *The policy must insure* all eligible employees of each employer who does not derive any part of such funds from contributions by his employees and *at least 75% of the eligible employees of each employer* who does derive a part of such funds from contributions by his employees, except, in either case, any employee as to whom evidence of individual insurability is not satisfactory to the insurer. For the purposes of this paragraph a union shall be deemed to be an employer and a member of a union shall be deemed to be an employee. (Emphasis added.)

Section 842(e) clearly applies to the contract at issue in this case because the statutory 75% language was incorporated almost verbatim in two significant provisions of Master Group Policy MMG 1128 as follows:

THE APPLICATION

5. It is desired that the insurance become effective on January 1, 1971 or as soon thereafter as the Company shall have received payment on account of the premium, the required completed applications from *at least 75% each Local Union of the eligible individuals* (such applications to be not less than 25 in number) and the Company shall have approved this application and it is agreed that the insurance shall thereupon take effect in accordance with and subject to the contract to be issued to the Employer. (Emphasis added.)

TERMINATION OF EMPLOYEES OR MEMBERS INSURANCE

Insurance of the individual insured hereunder shall terminate automatically (a) upon failure to pay any premium when due; . . . or (e) *if, at any time, less than 50 lives or less than 75% of the eligible Employees or Members are insured under the Group,* the Master Policy may be cancelled by the Company not later than the end of the current policy year. (Emphasis added.)

Since the only arguable alternative provision, Ill. Rev. Stat. ch. 73, §842(2)(c) (A52) does not contain the express 75% requirement, it is inconceivable that the parties intended to be governed by that section as respondents suggested below. Answer Brief of Appellees at 30. Furthermore, in order to justify the unrealistically low premium rate of 47¢ per $1,000 of insurance under the contract with CNL as opposed to rates ranging from 77¢ to $1.30 immediately before and 70¢ to $1.00 immediately after, the Local Unions readily concede that they approached WCOE to negotiate for them as a large group. The Unions then adopt a contradictory position and claim that the

parties really did not intend the 75% requirement to apply to the entire group which negotiated the low rate, but only to the members of each individual Local Union which actually enrolled under the policy. Under this view, as long as 75% of the members of a single union with at least 50 members remained, the insurer would be obligated to accept the 47¢ per $1,000 premium rate. The faulty economics of such a view combined with the almost verbatim incorporation of express statutory language, compels the conclusion that the parties intended to be governed by Ill. Rev. Stat. ch. 73, §842(2)(e).

Because the insurance contract involved here incorporated part of the comprehensive statutory scheme which regulates the Illinois insurance industry, the issues at stake in this case far transcend a mere dispute over the meaning, weight, and sufficiency of factual evidence. The court's decision below not only renders established Illinois precedent regarding construction of insurance contracts in doubt, but also strikes a serious blow at a portion of that state's statutory scheme for regulating the issuance of group life insurance. If the Local Unions in this case are allowed to disregard completely provisions of a state regulatory system which are expressly incorporated in a written insurance contract, the ramifications of such a decision would be far reaching indeed. Thus, the court's decision in this case directly affects the public interest in a way which justifies CNL's petition for writ of certiorari.

D. Conflict with
Applicable Illinois Law.

According to established Illinois law which applies to this case, the interpretation of insurance contracts is to be guided by the following principles:

1. Statutory provisions applicable to a contract of insurance and in force at the making thereof form a part of such contract and should be construed in connection with the policy. *Franey v. State Farm Mutual Automobile Insurance Co.*, 5 Ill. App.3d 1040, 285 N.E.2d 151 (1972), citing *Morris v. Central West Casualty Co.*, 351 Ill. 40, 183 N.E. 595 (1932) (rule applied to Workmen's Compensation); *Lumbermen's Mutual Insurance Co. v. Slide Rule & Scale Engineering Co.*, 79 F. Supp. 394 (S.D. Ill. 1948), affirmed 177 F.2d 305 (7th Cir. 1949) (rule applied to standard provisions in fire policies); *Konrad v. Hartford Accident & Indemnity Co.*, 11 Ill. App.2d 503, 137 N.E.2d 855 (1956) (rule applied to omnibus clauses in auto policies); 22 *Illinois Law and Practice*, Insurance §156.

2. Clear provisions upon which an insurer's calculations are based should be maintained unimpaired by loose interpretations. *Coons v. Home Life Insurance Co.*, 368 Ill. 231, 13 N.E.2d 482 (1938).

3. Parties to an insurance contract may incorporate such provisions not in violation of law as they choose, and it is the court's duty to construe and enforce the contract as made. *Harris v. Universal Underwriters, Inc.*, 37 Ill. App.2d 367, 185 N.E.2d 704 (1962); *Blanchard v. Jackson Funeral System Ass'n.*, 327 Ill. App. 290, 64 N.E. 2d 201 (1945); *Moscov v. Mutual Life Insurance Co.*, 387 Ill. 378, 56 N.E.2d 399 (1944).

4. Contracts of insurance, while they are required to be liberally construed in favor of the insured, must be construed according to the meaning of the terms which the parties have used and, if the terms are clear and unambiguous, they are to be so construed and enforced. *Crutchfield v. Continental Assurance Co.*, 336 Ill. App. 411, 84

N.E.2d 333 (1949), citing *Zitnik v. Burik*, 395 Ill. 182, 69 N.E.2d 888 (1946); *Moscov v. Mutual Life Insurance Co.*, 387 Ill. 378, 56 N.E.2d 399 (1944).

STATUTORY CONSTRUCTION

Since underwriting standards for group insurance are generally fixed by statute and not by the insurance companies or the insured, the language of the contract should be construed to conform to statutory requirements. The initial 75% participation requirement is necessary to help achieve the expected mortality rates, to help average the insured lives, and to protect the companies from individual selection. *Group Insurance Handbook, supra* at 168.

In the instant case, the court of appeals opinion conflicts with Illinois state law in that it fails to construe and enforce the written contact at issue according to its terms, *i.e.*, according to Illinois statutory law incorporated into the contract. Had the court done so, it would have necessarily construed the terms of the policy consistently with the statute and rejected as clearly erroneous the trial court's finding that the 75% requirement was ambiguous.

Even assuming that the policy language were ambiguous, the court's decision is still in conflict with the applicable law of Illinois as established in the case of *Bronson v. Washington National Insurance Co.*, 59 Ill. App.2d 253, 207 N.E.2d 172 (1965). In that case, the Illinois court held that ambiguous language in a contract which is substantially that required by statute is *not* to be construed liberally to effect the intention of the parties. The court further held that the rules applicable to statutory construction should be applied in construing the language of such a contract rather than the rules designed to effect the

intention of the parties. These principles of construction are that a statute must be construed according to its plain meaning; the words used in a statute are to be given their ordinary and usual meaning unless different intent is clearly indicated; legislative intent must be ascertained primarily from the language of a statute; and if the language used is plain and unambiguous, the legislature must be understood as meaning what it expressly declared.

Applying these principles to the statute at issue, Section 842(2)(e) states that the persons eligible for insurance shall be all of the employees of the employers or all of the members of the unions, and requires that 75% of the eligible employees of such employer be insured. (A53.) For the purpose of determining who is an employer, the statute states that a union shall be deemed an employer and a member of a union shall be deemed an employee.

The Application refers to " . . . at least 75% each Local Union of the eligible individuals . . . " (A68); Master Group Policy MMG 1128 refers to " . . . less than 75% of the eligible employees or members . . . " (A56); and the termination provision on page 3 of the Master Group Policy, " . . . or less than 75% of the eligible employees or members . . . " (A62.) The Addendum to the Application refers specifically to " . . . coverage for members of the listed Local Unions that are associated and affiliated with the Western Conference of Operating Engineers, which are located in the States listed below: Alaska, Arizona, California, Colorado, Hawaii, Idaho, Montana, New Mexico, Nevada, Oregon, Utah, Washington, Wyoming and Guam." (A69.)

The trial court's findings make it clear that the master policy or contract of insurance was with an association of several unions, whether

that association or group was comprised of 36 Local Unions (all members of WCOE) or a lesser number of Local Unions (only those members approving WCOE's application at the Phoenix meeting). According to the termination clause of the contract, (A62). the group policy terminates automatically:

> e. If, at any time, less than 50 lives or less than 75% of the eligible employees or members *of each local union* are insured *under the group.* (Emphasis added.)

Since only 10 of the 11 Local Unions approving WCOE's application in Phoenix were ever insured under the policy, it is clear that even the *smallest* "group" of Local Unions failed to remain properly insured as required by the policy. It follows that the trial court should have found and the court of appeals should have affirmed a finding that CNL was well within its rights pursuant to Illinois law in terminating the contract.

WAIVER

The court of appeals also misapplied Illinois law in affirming the trial court's finding (Conclusion of Law No. 24, A34) that CNL was subject to the defenses of waiver and estoppel on the 75% enrollment and participation issue. Although Illinois courts do hold that insurance provisions prescribed by statute may be waived and that the insurer by its conduct may be estopped from asserting them, this does not mean that Illinois courts automatically refuse to determine the scope of any alleged waiver. This principle was clearly illustrated in the case of *Midwest Triangle Paint Works v. Firemen's Fund Insurance Co.*, 36 Ill. App.2d 65, 183 N.E.2d 562 (1962).

In *Midwest,* suit was brought on several fire policies issued by defendant insurers. Each policy contained a provision limiting the time for institu-

tion of suit to twelve months after loss. Plaintiff sustained a fire loss on December 31, 1958, and brought suit after the twelve-month period had expired. Defendants' motion for summary judgment was granted, and the insured appealed claiming that the limitations defense had been waived.

After stating the general rule that statutory provisions appearing in insurance contracts may be waived, 183 N.E.2d at 564, the court went on to determine the scope of the waiver. In this case the court held that putting the most favorable construction upon the language of the affidavit supporting the claim of waiver, "the most that can be said is that the time for filing proofs of loss was waived and plaintiff given the opportunity to file new proofs." 183 N.E.2d at 565. The affidavit contained nothing supporting a claim that the limitations period itself had been waived. 183 N.E.2d at 564.

An analogous situation is presented by the instant case. Respondents argued below that CNL's refusal to cover Local 3 on August 18, 1971, some six weeks after the July 1 enrollment deadline, indicated that CNL was actually handling the 75% enrollment and participation requirement on a local-by-local basis. Answer Brief of Appellees at 61. Furthermore, the issuance of Policy No. MMG 1128 and continued performance until August 19, 1971 allegedly constituted a waiver of the 75% requirement in total. *Id.* at 61-62.

CNL's position is that although it may have waived the July 1 *deadline* for enrollment of 75% of the eligible members of each Local Union in the group, it never waived the 75% requirement itself. On the contrary, although Local 3 was given more than 6 weeks beyond the original

July 1, 1971 deadline to enroll 75% of its membership, it insured only its retirees during this period. A more classic case of adverse selection could hardly be imagined. Since the 75% requirement was designed to protect insurance companies against precisely this sort of risk, see *Group Insurance Handbook, supra* at 168, CNL was clearly within its rights in refusing coverage to Local 3. Once Local 3 had been refused coverage, CNL had the right to cancel the group either under the application provision since less than 75% of the eligible members of the group were enrolled, or under the termination provision since less than 75% of the eligible members of the group were insured at that time. CNL cancelled the group within 24 hours of refusing coverage to Local 3.

Petitioner submits that its conduct in this case did not amount to a blanket waiver of the entire 75% enrollment and participation requirement and that the lower courts misapplied Illinois law in so holding.

VII.

CONCLUSION

In affirming the judgment entered by the trial court, the court of appeals ignored the effect to be given to the percentage enrollment and participation requirement specified by the Illinois Insurance Code. It did so in the face of Illinois precedents on the subject thereby depriving petitioner of the protection of local law. The requirement involved is common to the insurance codes of many states and, accordingly, a question of national concern is presented. Furthermore, the court's opinion on its face was based on a misunderstanding of the factual context within which the case arose; petitioner has therefore been denied

a fair hearing with respect to the issues involved. For these reasons this Court should take action to correct the court of appeals' erroneous decision.

Petitioner respectfully urges the Court to grant a writ of certiorari in this proceeding.

Respectfully submitted,

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APPENDIX A

In The United States District Court
FOR THE DISTRICT OF NEW MEXICO

INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 953, LOCAL 302, LOCAL 326, LOCAL 370, LOCAL 371, LOCAL 400, LOCAL 428 and LOCAL 612, *Plaintiffs,* *vs.* CENTRAL NATIONAL LIFE INSURANCE COMPANY, *Defendant.*	No. 9458 Civil

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The following shall constitute the findings of fact and conclusions of law.

FINDINGS OF FACT

1. Plaintiffs, International Union of Operating Engineers Locals 953, 302, 326, 370, 371, 400, 428 and 612, at all material times were, and are now, unincorporated associations and labor organizations as defined under 29 U.S.C. §152(5), and are proper parties to sue in their own name.

2. Plaintiffs possessed authority in accordance with applicable federal labor statutes and state insurance statutes and in accordance with their Bylaws, Minutes, and the custom and practice of their Local Unions, to obtain, on behalf of their members and for their benefit, group life and accident insurance.

3. Defendant, Central National Life Insurance Company, at all material times was, and is, a corporation organized and existing under the laws of Illinois, engaged in doing business as an insurer in the State of New Mexico as authorized by the Superintendent of Insurance of the State of New Mexico.

4. Western States Conference of Operating Engineers is an unincorporated association of local unions of the International Union of Operating Engineers with its office and headquarters at San Mateo, California.

5. At a meeting held on November 10, 1970, representatives of Plaintiffs and certain other Local Unions unanimously agreed that the President and Secretary-Treasurer of the Western States Conference of Operating Engineers were to continue their efforts to gain information on the type of coverage which could be obtained by the unions on a group basis and the premium cost therefor.

6. At a meeting held on January 15, 1971, representatives of Plaintiffs and certain other Local Unions passed a motion authorizing the President and Secretary of Western States Conference of Operating Engineers to execute an Application for insurance with the Defendant.

7. Effective January 1, 1971, Defendant offered and made available its contract of insurance, Master Group Policy MMG 1128, to Local Unions which were members

of the Western States Conference of Operating Engineers. A Local Union could join on any monthly premium due date prior to July 1, 1971.

8. The Application, Master Group Policy, and Addendum are all part of and make up the policy of insurance identified as MMG 1128.

9. Each of Plaintiffs, between the dates of January 1, 1971, and July 1, 1971, notified Defendant of its election to participate under Master Group Policy MMG 1128 from its business office in the state of its residence. Premiums were paid by each Local from its business office.

10. Defendant mailed its acceptance of liability to the business office of each Plaintiff.

11. A copy of Master Group Policy MMG 1128 was delivered by Defendant through the mail to the business office of each Plaintiff in the state of its residence.

12. Master Group Policy MMG 1128 provided for life insurance coverage for all active and retired members of participating Local Unions which were members of the Western States Conference of Operating Engineers upon payment of monthly premiums and upon acceptance of such coverage by those Locals and by Defendant.

13. The premium rate provided for in Master Group Policy MMG 1128 was $0.47 each $1,000 of life insurance coverage per member per month, $0.05 each $1,000 of accidental death and dismemberment coverage per member per month, and $0.52 each $1,000 for dependents life coverage per family unit.

14. Master Group Policy MMG 1128 provided that the premium rates set forth in Finding of Fact No. 13 were guaranteed at that rate for three years.

15. Pursuant to said contract and policy of insurance, Plaintiffs accepted said coverage, notified Defendant, and paid initial premiums to bind coverage which premiums were accepted by Defendant.

16. Thereafter, all Plaintiff Locals paid all premiums due. The Western States Conference of Operating Engineers paid no premiums under the policy.

17. The application for Master Group Policy MMG 1128 provided that the insurance was to become effective "on January 1, 1971 or as soon thereafter as the Company shall have received payment on account of the premium, the required completed applications from at least 75% each Local Union of the eligible individuals (such applications to be not less than 25 in number) and the Company shall have approved this application and it is agreed that the insurance shall thereupon take effect in accordance with and subject to the contract to be issued to the Employer."

18. The Master Group Policy itself provided, among other things, that "[i]f on any renewal date the number of Employees or Members then insured hereunder should be less than 50, the Company shall have the right to decline such renewal." It further provided that "insurance of the individual insured hereunder shall terminate automatically . . . (E) if, at any time, less than . . . 75% of the eligible Employees or Members are insured under the group, the Master policy may be cancelled by the Company not later than the end of the then current policy year."

19. At no time during the enrollment period, or thereafter, were 75% of the eligible members of all of the Local Unions affiliated with the Western States Conference of Operating Engineers enrolled under Master Group Policy MMG 1128.

20. At all times during the enrollment period, 75% of the eligible members of each Plaintiff Local were enrolled under Master Group Policy MMG 1128.

21. The language in the Application requiring submission of completed applications from "at least 75% each Local Union of the eligible individuals . . . " and the language in Policy MMG 1128 requiring membership of 75% of the eligible employees or members is ambiguous. It is determined that this language was intended by the parties to require membership by 75% of the eligible individuals of each participating Local Union which was a member of the Western States Conference of Operating Engineers and they so construed it.

22. On or about August 19, 1971, Defendant notified Plaintiffs and other participating members of the Western States Conference of Operating Engineers at the business office of said Local Union that Defendant was cancelling Master Group Policy MMG 1128. The sole reason given was that "[s]ince the Presidential wage price freeze prevents us from increasing premiums, we have no other alternative other than to cancel the above contract effective September 1, 1971."

23. No notice of cancellation was sent by Defendant to the Western States Conference of Operating Engineers.

24. By letter dated August 26, 1971, Defendant suspended the cancellation for two weeks.

25. After its notice of cancellation, Defendant refused to pay death benefits to Plaintiffs' members as required under Master Group Policy MMG 1128.

26. On October 14, 1971, Defendant and the Western States Conference of Operating Engineers entered into a

Memorandum of Understanding which provided that the rate for life insurance effective October 1, 1971, was increased to $1.00 per $1,000; that the rate for accidental death and dismemberment was to remain the same; that the rate for dependents life coverage per family unit was to increase to $0.85 per $1,000; that the Defendant would accept any pending premiums at the prior rate; that the Defendant would immediately resume processing all pending claims under the previous coverage; that the coverage was on a month-to-month basis until March 1, 1972, at which time the parties could mutually agree for an extended period, or to terminate the coverage.

27. Plaintiff Local 953 refused to pay the higher premium rate. All other Plaintiffs paid the higher premium rate from October 1, 1971, until March 1, 1972.

28. On or about October 15, 1971, after analyzing numerous bids to determine the lowest rate available, Plaintiff Local 953 entered into a contract of insurance with Hartford Life and Accident Insurance Company, providing the same death benefits at a rate of $0.70 each $1,000 of life insurance coverage per member per month, $0.13 each $1,000 of accidental death and dismemberment coverage per member per month, and $0.47 each $1,000 of dependent life coverage per family unit.

29. After analyzing bids to determine the lowest rate available, all other Plaintiffs entered into contracts of insurance with Safeco Life Insurance Company, providing the same death benefits at a rate of $1.00 each $1,000 of life insurance coverage per member per month, $0.12 each $1,000 of accidental death and dismemberment coverage per member per month, and $0.80 each $1,000 dependent life coverage per family unit, effective March 1, 1972.

30. The difference in premium rates has resulted in a difference between the total monthly premiums guaranteed in Master Group Policy MMG 1128 by Defendant and those paid, and which will be paid for the remaining term of MMG 1128, by Plaintiffs of approximately: Local 953, $34,555.33; Local 302, $223,674.68; Local 326, $40,154.44; Local 370, $94,182.48; Local 371, $16,383.22; Local 400, $42,083.60; Local 428, $65,416.55; and Local 612, $47,414.86.

31. Plaintiffs have established the validity of Master Group Policy MMG 1128.

32. The cancellation of Master Group Policy MMG 1128 by Defendant was not warranted under the terms of the policy.

33. The contract was a term policy for a period of three years with a guaranteed premium rate for three years.

34. This contract was entered into between the Defendant and the participating Local Unions which were members of the Western States Conference of Operating Engineers. The Plaintiffs in this case being members of the Western States Conference were entitled to the benefits and the privileges of the policy.

35. The Memorandum of Understanding entered into on October 14, 1971, in no way affected any of Plaintiffs' rights or any of Defendant's obligations under Master Group Policy MMG 1128. The Memorandum expressly provided "[t]hat neither party surrenders or in any way modifies its position as to the validity or invalidity of that certain document numbered MMG 1128."

36. The Plaintiffs' reason for entering into the Memorandum of Understanding was to secure payment of

death claims which had been withheld by Defendant while not affecting the rights of the parties with respect to Master Group Policy MMG 1128.

37. A mistake was made by Defendant in reaching its determination of the original premium rate to be paid by the participating locals pursuant to Master Group Policy MMG 1128.

38. At the time the bid of $0.47 per month for each $1,000 of life insurance was submitted by Defendant, the representatives of the participating Local Unions and of the Western States Conference of Operating Engineers did not know, nor in the exercise of reasonable judgment should they have known, that the bid was too low and that a mistake had been made by Defendant.

39. There is no evidence of a mutual mistake of a material fact in the execution of Master Group Policy MMG 1128.

40. Enrollment cards were provided to the Western States Conference of Operating Engineers for distribution to participating Locals, but they were never completed or returned to Defendant by any Local Union or by the insured members of any Locals.

41. There is no evidence that Defendant, at any time after submission of the Application, requested of Plaintiffs or their members the completion and submission of these enrollment cards.

42. The agent and officer of Defendant did not exceed their authority in negotiating and entering into Master Group Policy MMG 1128 on behalf of Defendant.

43. There is no evidence that enforcement of Master Group Policy MMG 1128 would be unconscionable and would be in violation of public policy and applicable law.

44. There is no evidence to sustain the allegation that Master Group Policy MMG 1128 is illusory and is unenforceable and of no effect.

45. There is no evidence to indicate how the Presidential wage-price freeze would have affected the validity of Master Group Policy MMG 1128.

CONCLUSIONS OF LAW

1. This Court has jurisdiction of the subject matter of and the parties to this action.

2. Plaintiffs are all unincorporated labor organizations and are all proper parties to sue in their own names.

3. Each Plaintiff possessed authority and capacity to obtain, on behalf of their members, and for their benefit, group life and accident insurance.

4. The President and Secretary of the Western States Conference of Operating Engineers were authorized by Plaintiffs to gain information on the type of coverage and premium cost which could be obtained by the Plaintiffs and certain other Local Unions on a group basis and to execute an Application for insurance to the Defendant.

5. Each Plaintiff entered into a valid contract of insurance with Defendant, pursuant to Master Group Policy MMG 1128, binding upon and enforceable against Defendant.

6. The agent and officer of Defendant had authority to enter into Master Group Policy MMG 1128 and to bind Defendant to the terms and conditions thereof.

7. The policy provided that premium rates set forth therein were guaranteed at that rate for a term of three years, effective January 1, 1971.

8. The 75% membership requirement of Master Group Policy MMG 1128 is ambiguous. It is determined that the parties intent was to require membership by 75% of the eligible individuals of each participating local union which was a member of the Western States Conference of Operating Engineers.

9. The final act necessary to consummate the contract of insurance between each Plaintiff and Defendant, pursuant to Master Group Policy MMG 1128, took place in Illinois upon Defendant's acceptance of each Plaintiff's tendered premiums. The law of Illinois applies to interpret the policy and to determine damages.

10. Each Plaintiff performed each and every material term, covenant, and condition of Master Group Policy MMG 1128 on its part to be kept and performed.

11. On or about August 18, 1971, while Master Group Policy MMG 1128 was in full force and effect between each Plaintiff and Defendant, Defendant unilaterally cancelled Master Group Policy MMG 1128. The effective date of such cancellation, after the two week suspension, was October 1, 1971.

12. Defendant's cancellation of Master Group Policy MMG 1128 was wrongful, not warranted under the terms

of the policy, and was a breach of its contractual obligations to each Plaintiff.

13. There was not a mutual mistake of a material fact in the execution of Master Group Policy MMG 1128.

14. Any mistake made by Defendant in its calculation of the premium rate initially charged Plaintiffs under MMG 1128 was not known to Plaintiffs, nor in the exercise of reasonable judgment should it have been known.

15. The contract of insurance between each Plaintiff and the Defendant was not an unconscionable contract nor was it in violation of public policy.

16. Defendant did withhold and threatened to continue to withhold payment of valid death claims to beneficiaries of deceased members of Plaintiffs, until Plaintiffs paid a higher premium rate than the rate set forth in Master Group Policy MMG 1128, as set forth in the Memorandum of Understanding. Defendant's withholding of valid death claims was wrongful and was a breach of its contractual obligation to each Plaintiff under Master Group Policy MMG 1128.

17. Defendant's refusal to pay valid death claims unless Plaintiffs first paid the higher premium rate set forth in the Memorandum of Understanding was wrongful and amounted to an act of economic duress or economic coercion against each Plaintiff.

18. The Memorandum of Understanding did not release or discharge Defendant from liability, or in any way modify any of Defendant's contractual obligations to each Plaintiff, as set forth in Master Group Policy MMG 1128.

19. The Memorandum of Understanding did not amend Master Group Policy MMG 1128.

20. The Memorandum of Understanding was induced by Defendant's economic duress or economic coercion against each Plaintiff and is not a valid agreement binding upon or unenforceable against either Plaintiffs or Defendant.

21. There was no good and adequate consideration for execution of the Memorandum of Understanding, and it is not a valid agreement binding upon or enforceable against either Plaintiffs or Defendant.

22. Following Defendant's wrongful breach of Master Group Policy MMG 1128, Plaintiffs properly acted to mitigate their damages.

23. As a direct result of Defendant's wrongful breach of Master Group Policy MMG 1128, each Plaintiff was required to obtain the same insurance coverage for its members from another carrier at a premium rate in excess of the premium rate provided in Master Group Policy MMG 1128. Said difference in premiums has caused each Plaintiff to sustain damages in the following amount: Local 953, $34,555.33; Local 302, $223,674.68; Local 326, $40,154.44; Local 370, $94,182.48; Local 371, $16,383.22; Local 400 $42,083.60; Local 428, $65,416.55; and Local 612, $47,414.86.

24. In regard to the denials, affirmative defenses and counterclaims set forth in Defendant's Answers to each of Plaintiffs' Complaints or Causes of Action, they were waived by Defendant and Defendant is estopped from raising them or claiming under them.

25. Plaintiff, International Union of Operating Engineers, Local 953, is entitled to judgment against Defendant Central National Life Insurance Company for breach of contract in the sum of $34,555.33 plus costs.

26. Plaintiff International Union of Operating Engineers, Local 302, is entitled to judgment against Defendant Central National Life Insurance Company for breach of contract in the sum of $223,674.68 plus costs.

27. Plaintiff International Union of Operating Engineers, Local 326, is entitled to judgment against Defendant Central National Life Insurance Company for breach of contract in the sum of $40,154.44 plus costs.

28. Plaintiff International Union of Operating Engineers, Local 370, is entitled to judgment against Defendant Central National Life Insurance Company for breach of contract in the sum of $94,182,48 plus costs.

29. Plaintiff International Union of Operating Engineers, Local 371, is entitled to judgment against Defendant Central National Life Insurance Company for breach of contract in the sum of $16,383.22 plus costs.

30. Plaintiff International Union of Operating Engineers, Local 400, is entitled to judgment against Defendant Central National Life Insurance Company for breach of contract in the sum of $42,083.60 plus costs.

31. Plaintiff International Union of Operating Engineers, Local 428, is entitled to judgment against Defendant Central National Life Insurance Company for breach of contract in the sum of $65,416.55 plus costs.

32. Plaintiff International Union of Operating Engineers, Local 612, is entitled to judgment against Defendant Central National Life Insurance Company for breach of contract in the sum of $47,414.86 plus costs.

33. Plaintiffs' claim for breach of contract is one for unliquidated damages. Attorneys fees and interest are not allowable in a claim for unliquidated damages under Illinois law absent an agreement or statute to the contrary.

Any requested findings and conclusions not included herein are hereby denied.

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UNITED STATES DISTRICT JUDGE

In The United States District Court
FOR THE DISTRICT OF NEW MEXICO

No. 9458 Civil

INTERNATIONAL UNION OF
OPERATING ENGINEERS,
LOCAL 953, LOCAL 302, LOCAL 326,
LOCAL 370, LOCAL 371, LOCAL 400,
LOCAL 428 and LOCAL 612,
Plaintiffs,

vs.

CENTRAL NATIONAL LIFE
INSURANCE COMPANY,
Defendant.

JUDGMENT

The above matter having come on for trial on its merits before the Court sitting without a jury, and the Court having heard the evidence and the arguments of counsel and having studied the briefs of the parties and having entered its Findings of Fact and Conclusions of Law; Now, Therefore,

IT IS ORDERED, ADJUDGED AND DECREED that judgment be entered against the Defendant, Central National Life Insurance Company, and for the Plaintiffs in the following amounts:

Plaintiff, International Union of Operating Engineers Local 953, shall have judgment against Defendant Central National Life Insurance Company for the sum of $34,555.33 plus costs.

Plaintiff, International Union of Operating Engineers Local 302, shall have judgment against Defendant Central National Life Insurance Company for the sum of $223,-674.68 plus costs.

Plaintiff, International Union of Operating Engineers Local 326, shall have judgment against Defendant Central National Life Insurance Company for the sum of $40,154.44 plus costs .

Plaintiff, International Union of Operating Engineers Local 370, shall have judgment against Defendant Central National Life Insurance Company for the sum of $94,182.48 plus costs.

Plaintiff, International Union of Operating Engineers Local 371, shall have judgment against Defendant Central

National Life Insurance Company for the sum of $16,383.22 plus costs.

Plaintiff, International Union of Operating Engineers Local 400, shall have judgment against Defendant Central National Life Insurance Company for the sum of $42,083.60 plus costs.

Plaintiff, International Union of Operating Engineers Local 428, shall have judgment against Defendant Central National Life Insurance Company for the sum of $65,416.55 plus costs.

Plaintiff, International Union of Operating Engineers Local 612, shall have judgment against Defendant Central National Life Insurance Company for the sum of $47,414.86 plus costs.

.....

UNITED STATES DISTRICT JUDGE

The foregoing Findings of Fact, Conclusions of Law, and Judgment of the United States District Court for the District of New Mexico were entered on May 21, 1973.

APPENDIX B

INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 953, et al.,
Plaintiffs, Intervenors-Appellees,
v.
CENTRAL NATIONAL LIFE INSURANCE COMPANY
Defendant-Appellant

No. 73-1813

United States Court of Appeals,
Tenth Circuit.

Argued May 15, 1974.
Decided July 30, 1974.
Rehearing Denied August 27, 1974.

Before LEWIS, Chief Judge, and HOLLOWAY and and McWILIAMS, Circuit Judges.

McWILLIAMS, Circuit Judge.

This is a breach of contract case wherein a policyholder made claim against an insurance company for damages arising out of the insurer's unlawful cancellation of an insurance policy. In a trial to the court, sitting without a jury, the policyholder prevailed and the insurance company now appeals. The principal issue raised on appeal is whether under the circumstances of this case a mistake by the insurance company's agent in computing the premium rate is grounds for rescission. The trial court concluded that it was not, and we agree. Reference to the background facts will place the several related issues in context.

The plaintiffs are eight unincorporated local unions of the International Union of Operating Engineers which

operate in New Mexico, Arizona, Wyoming, Oregon and Washington. The Western States Conference of Operating Engineers (WCOE) is a voluntary unincorporated association of local unions, including the eight locals which are the present plaintiffs, organized for the purpose of assisting the local unions in solving their common problems by serving as a clearing house. The locals, however, are themselves autonomous, and WCOE has no power or authority, as such, over them.

In the latter part of 1970, numerous locals in WCOE, though by no means all, were interested in obtaining group life insurance coverage under a single master group policy, through which they hoped to obtain a lower premium rate than many of them were then individually paying because of the larger number of lives which would be thus insured. To further this aim, WCOE was authorized by the locals to gather information and obtain for the interested locals a group life insurance policy along the lines indicated.

In attempting to secure such a group policy, WCOE contacted representatives of the Central National Life Insurance Company, an Illinois corporation authorized to do business in New Mexico, which company will hereinafter be referred to as Central. Based on certain statistical information given Central, the latter offered to issue a group life insurance policy at a premium rate of 47¢ per $1,000 of life insurance per member per month. And the crux of this case is that the aforesaid "monthly premium rate [was] guaranteed for three (3) years."

Bids were submitted by several insurance companies, and WCOE finally narrowed the bids to those of Central and Safeco, the former's being the lowest offer. Safeco's

was the next lowest bid at apparently either 52¢ or 55¢ per thousand per member per month, depending on the particular plan of insurance.

The plaintiffs eventually accepted the offer of Central and the latter issued its group policy to the eight locals who are the present plaintiffs, as well as to other locals who are not parties to the present proceeding. At the same time, the various locals began to pay the monthly premium rates called for by the policy.

Some eight months after the issuance of the policy, during which period of time Central accepted premiums from the various participating locals and in turn had been paying death claims, Central notified the plaintiffs in writing that the policy was being cancelled. The only reason given by Central for cancellation was that "since the Presidential wage freeze prevents us from increasing premiums, we have no other alternative other than to cancel the above contract, effective September 1, 1971." Although the foregoing was the only reason given for cancellation, the record reflects that the cancellation was precipitated by the fact that death benefits were far exceeding the premiums paid during the eight months the group policy was in effect.

Central's attempted cancellation of the group policy engendered the present dispute. Negotiations between the parties ensued. Out of these negotiations emerged a Memorandum of Understanding between Central and all of the locals which are plaintiffs in this case, except Local Number 953. Under the terms of this memorandum the locals, except for 953, agreed to pay a higher premium from October 1, 1971, till March 1, 1972, and in return Central

agreed to process pending death claims. The memorandum, however, reserved to all parties their respective rights under the group life insurance policy.

Local Number 953, as indicated, did not sign the Memorandum of Understanding, and it immediately sought other insurance to replace the policy it had with Central. In this regard, Local Number 953 thereafter entered into a contract with Hartford Life & Accident Insurance Company, effective October 15, 1971, the premium rate therefor being 70¢ per thousand per member per month. The other locals which are plaintiffs in the present case later entered into a contract with Safeco, effective March 1, 1972, which was the expiration date for the Memorandum of Understanding, the premium rate for such insurance being $1.00 per thousand per member per month.

It was in this setting that Local Number 953 brought the present case against Central in the state courts of New Mexico, alleging that in cancelling the group policy Central breached the contract which called for a fixed premium rate for a three-year period. The case was later removed to the United States District Court for the District of New Mexico on the grounds of diversity. Seven other locals then sought to intervene as parties plaintiff and their respective motions to intervene were granted. The measure of damages sought was the difference between the premium rate agreed to by Central and guaranteed for three years and the cost of replacement insurance for the same three-year period of time. As indicated, in a trial to the court the judge found for the eight plaintiffs and awarded each its separate damages for the increased cost of replacement insurance. On appeal the central issue, as we see it, concerns the effect of a mistake made by an agent

of Central in determining the 47¢ per thousand per member per month figure. We shall develop that phase of the controversy a bit.

Although Central realized throughout 1971 that its death benefits were exceeding its premiums, Central did not discover its own mistake till sometime in 1972. It did later develop, however, that the employee of Central who calculated the 47¢ premium rate had made a mathematical mistake in her computations, which resulted in the quoting of a lower premium rate than should have been the case. If the error in addition had not been made, the premium rate would have been 73½¢ per thousand per member per month. Additionally, it developed that the person who made the rate computation also did not get all of the statistical information from the plaintiffs necessary to make an actuarially sound computation.

It is Central's position in this court, as it was in the trial court, that it is entitled to equitable rescission because of the arithmetical mistake made by one of its employees in computing the premium rate on the group policy issued the plaintiffs. In support thereof, Central first argues that the plaintiffs either knew, or should have known, of this mistake in computation and that the plaintiffs are now seeking to reap a profit from the mistake. In this particular connection we find it somewhat anomalous for Central to contend that the plaintiffs either knew, or should have known, of a mistake which Central did not itself discover for over a year. *Cf.* General Electric Supply Corp. v. Republic Const. Corp., 201 Or. 690, 272 P.2d 201 (1954). In any event, the trial court made a finding of fact that the plaintiffs did *not* know of Central's mistake, nor that they should have known, and such finding is supported by the record.

[1] Admittedly Central's was the low bid, but, as indicated, Safeco's bid was either 52¢ or 55¢ per thousand and was described by one witness as being in the "same ball park." To make certain of Central's bid, the plaintiffs during the negotiations leading up to the issuance of the group policy insisted that an officer of Central be present at a subsequent meeting of the parties in order to verify the premium rate. This was done. Additionally, there was evidence that Central was trying to be the low bidder in order to gain the opportunity to perhaps sell additional insurance to other locals in the International Union which as of that time were not going to participate in the program. All things considered, the trial court's finding that the plaintiffs did not know of Central's mistake is certainly not clearly erroneous and on appeal such may not be disturbed by us.

On the question of mistake, Central additionally argues that even a so-called unilateral mistake may under certain circumstances be ground for rescission. It is true that the law on this point is perhaps not quite as harsh as it formerly was. In this connection, in 3 Corbin on Contracts § 606 (2d ed. 1960) appears the following comment:

> "Relief for mistake depends, not only upon the materiality of the mistake, but also upon the stage in the transaction at which the mistake is discovered and notice given. How far has performance already gone? To what extent and at what cost can the status quo ante be restored? What changes of position in reliance on the contract, by a party to it or by third parties, have occurred? • • •
>
> "It is often stated as a reason for denying relief that the mistaken party was negligent in making the mistake. A century ago it was often

> thought that in refusing relief it was sufficient to say that a man must bear the consequences of his own 'folly.' Court decisions now indicate that prevailing opinion is less harsh in its judgment of those who fail to act in accordance with some standard of care and prudence. We must still bear 'the consequences' of our own folly; but the court decisions have moderated some of those 'consequences.' They seem to justify the statement that one is held responsible for harm to others if it is caused by his 'folly' or his negligent mistake, but his responsibility need not be carried so far as to permit others to profit by reason of his mistake."

The parties to this controversy agree that the instant case is governed by Ilinois law, and the law of that state would appear to be in general accord with the quotation from *Corbin*. For example, People ex rel. Dept. of Public Works & Buildings v. South East Nat'l Bank, 131 Ill. App. 2d 238, 266 N.E. 2d 778 (1971), is illustrative. In that case an engineering contractor made an arithmetical mistake in computing his bid on a public works project due to an inadvertently misplaced decimal point. The contractor caught his error and notified the state of the error and his desire to withdraw his bid. The state ignored this notification and proceeded to award him the job on his earlier bid. In such circumstances the contractor was held to have the right to rescind and in so holding that court declared as follows:

> "The rule is often stated that relief will not be granted if but one party to a contract has made a mistake. See e.g. Restatement of the Law of Contracts, sec. 503; Restatement of the Law of Restitution, sec. 12. Professor Williston argues in his treatise on contracts that affirmative relief for a unilateral mistake is justified only where the mistake was known to the other party to the

transaction or where the person against whom relief is sought is in the position of a donee or volunteer. Williston on Contracts (Rev. ed. 1973), Vol. V, secs. 1573, 1579. However, in numerous cases relief has been granted under less rigorous conditions (Annot. 59 A.L.R. 809; Corbin on Contracts, Vol. 3, secs. 608, 609) and the professor himself concedes that rescission should be allowed where a bid was predicated on erroneous arithmetical processes and the party not in error knew or should have known of the mistake. Williston on Contracts, Rev. ed., Vol. 5, sec. 1578.

> "The conditions generally required for rescission are that the mistake relate to a material feature of the contract; that it occurred notwithstanding the exercise of reasonable care; that it is of such grave consequence that enforcement of the contract would be unconscionable, and that the other party can be placed in status quo. Pomeroy's Equity Jurisprudence, Vol. 3 (5th ed. Symons 1941), sec. 870a; annot. 52 A.L.R. 2d 792; 59 A.L.R. 809. Evidence of these conditions must be clear and positive. Winkelman v. Erwin, 333 Ill. 636, 165 N.E. 205 (1929)."

[2] Applying the foregoing principles to the facts of the instant case, we hold that the trial court did not err in finding that the unilateral mistake on the part of Central did not justify rescission. The facts of the instant case do not meet the requirements necessary for rescission as set forth in the Illinois case cited above. Certainly, for example, the plaintiffs in accepting the low bid of Central have lost the opportunity to accept the next lowest bid of Safeco, and it is difficult to see how the plaintiffs could at this late date be placed in status quo. Under the circumstances, then, this is not a case for rescission and Central must bear the consequences of its own folly.

[3] Central advances numerous other grounds for reversal, many of which were not presented to the trial court and none of which merits extended comment. We are disinclined to consider those matters which were not presented to the trial court for its consideration and are raised for the first time either after trial or on appeal to this court. Ordinarily a defendant may not lose in a trial court on one set of defenses and then on appeal expect to win on another and different theory of defense. Eureka-Carlisle Company v. Rottman, 398 F.2d 1015 (10th Cir. 1968), and Schenfeld v. Northern Company, 391 F.2d 420 (10th Cir. 1968).

[4] One argument which was presented to the trial court, and rejected by it, is that the group life insurance policy here involved is between Central and WCOE, and that the present plaintiffs, i.e., the eight local unions, not being parties to the contract, have no capacity to maintain the present action. This argument we believe to be specious. The policy itself refers to the "members" of WCOE, and the present plaintiffs are "members" of WCOE. All concerned understood that WCOE was acting at the behest of certain of its local unions who were desirous of getting a group life insurance policy. The monthly premiums for the eight months the policy was in effect were all paid for by the locals, not WCOE, and these premiums were accepted by Central. Furthermore, Central sent its notice of cancellation to the locals, not WCOE. Under such circumstances we agree with the determination of the trial court that the insurance contract was between Central and the locals. Assuming arguendo the validity of this particular argument, Central would then be faced with the related doctrines of waiver and estoppel, which we need not here consider. Significantly, Central's overall position is weakened

by the fact that in its cancellation notice it gave but *one* reason for cancellation, namely, that because of the Presidential freeze on prices it could not raise its premium rates. This reason is of course a non sequitur, since Central had agreed to the 47¢ per thousand rate for a term of three years.

Another matter submitted to the trial court was the contention of Central that the policy provisions required that at least 75% of the members of all locals having membership in WCOE be enrolled. In this regard Central states that in 1971 the total membership of all locals belonging to WCOE was approximately 108,000 and that only 72,528 members obtained coverage under Central's group policy, which is less than the required 75%.

[5] As concerns the 75% requirement, the plaintiffs contend that this simply meant that 75% of the members of those locals which subscribed to the group policy must enroll and that 75% of the members of those locals subscribing to the policy did in fact enroll. The trial court found the 75% requirement to be ambiguous and agreed with the plaintiffs that it was the intent of the parties that the provision in question only required that 75% of the members of those locals which elected to come under the group policy be enrolled. This finding is supported by substantial evidence and is not clearly erroneous, and should therefore not be disturbed by us. Certainly all parties knew that there were many locals in WCOE which were satisfied with the insurance they then had, and were not interested in Central's offer. Central's acceptance of premiums without questioning the enrollment percentage is certainly in accord with the trial court's interpretation of

the policy. And again, if the argument itself had intrinsic merit, Central would be subject to the defenses of waiver and estoppel.

[6] Central also complains that the trial court erred in its measure of damages, which, as indicated, was the difference between the premium rate guaranteed by Central for a term of three years and the cost of replacement insurance of a similar quality for a three-year term. Central states that the measure of damages should have been the difference between what its premium rate would have been, but for the arithmetical error, and cost of replacement error. For reasons set forth above, Central should not be permitted to thus benefit from its own error. The measure of damages used by the trial court would seem to be in accord with the general rule as set forth in 20 J. Appleman, Insurance Law & Practice § 11255 (2d ed. 1963):

> "The safest general rule adopted by the courts is that the measure of damages is the value of the policy at the time of breach. If the insured can secure insurance of a like character and value to that cancelled, the difference between the cost of carrying the cancelled insurance for the term stipulated and the cost of new insurance for a like term would be his measure of damages."

[7] There is also minor complaint that the plaintiffs failed to mitigate their damages in that they failed to find replacement insurance the cost of which more nearly approximated the mistaken bid of Central. There is nothing in the record to substantiate this argument. Many new factors entered into the cost of the replacement insurance, including the fact that the present dispute between Central and the locals became generally known in the insurance industry and resulted in some very careful computation of the premium rates for the replacement insurance.

Local 701 of the International Union brought a similar action against Central in the state courts of Oregon based on about the same sequence of facts as the present proceeding and involving the same group policy. In that case, as here, the local prevailed and Central appealed. On appeal the Oregon Supreme Court affirmed and their disposition of the matter parallels ours. *See* International Union of Operating Engineers, Local 701 v. Central National Life Insurance Company, 519 P.2d 85 (Or. 1974).

Judgment affirmed.

APPENDIX C

JULY TERM — AUGUST 27, 1974

Before The Honorable David T. Lewis, Chief Judge, The Honorable William J. Holloway, Jr., and The Honorable Robert H. McWilliams, Circuit Judges

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No. 73-1813

INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL NUMBER 953,

Plaintiff-Appellee,

vs.

CENTRAL NATIONAL LIFE INSURANCE COMPANY,

Defendant-Appellant,

LOCAL UNIONS NO. 371, 326, 302, 370, 612, 400 and 428 of the International Union of Operating Engineers,

Plaintiff-Intervenors.

This matter comes on for consideration of the petition for rehearing filed by the appellant in the captioned case.

Upon consideration whereof, the petition for rehearing is denied.

HOWARD K. PHILLIPS
Clerk

APPENDIX D

Ill. Rev. Stat. ch. 73, §§842(2)(c), (e) (1973):

(2) The following forms of life insurance, in addition to those described in subsection (1), are hereby declared to be group life insurance within the meaning of this Article:

(c) Life insurance covering the full privileged, voting and contributing members of any association which has been in existence for at least one year, not formed for the exclusive purpose of procuring insurance, or life insurance covering the members of any labor union, written under a policy issued to such association or union which shall be deemed to be the employer for the purposes of this Article, the premium on such policy to be paid by the association or union either from its own funds or from funds contributed by members or both, and insuring any of its members who are actively engaged in the same occupation, for amounts of insurance based upon some plan which will preclude individual selection, for the benefit of persons other than the association or union, or its officials. The term "association" or "members" may include employees of either.

(e) Life insurance, written under a policy issued to one or more trustees of a fund established by an association of employers on behalf of its members, or by 2 or more employers in the same industry or by one or more labor unions or by one or more employers and one or more labor unions, which trustees shall be deemed the policyholder, covering employees of the employers or members of the unions for the benefit of persons other than the employers or the unions, subject to the following conditions:

(i) The persons eligible for insurance shall be all of the employees of the employers

or all of the members of the unions, or all of any class or classes thereof determined by conditions pertaining to their employment, or to membership in the unions, or to both. The policy may provide that the term "employees" shall include retired employees. No director of a corporate employer shall be eligible for insurance under the policy unless such person is otherwise eligible as a bona fide employee of the corporation by performing services other than the usual duties of a director. No individual proprietor or partner shall be eligible for insurance under the policy unless he is actively engaged in and devotes a substantial part of his time to the conduct of the business of the proprietor or partnership. The policy may provide that the term "employees" shall include the trustees or their employees, or both, if their duties are principally connected with such trusteeship.

(ii) The premium for the policy shall be paid by the trustee or trustees wholly from funds furnished by the employer or employers of the insured persons. Such funds may be derived, at the option of each employer, in part from contributions by the employees insured. The policy must insure all eligible employees of each employer who does not derive any part of such funds from contributions by his employees and at least 75% of the eligible employees of each employer who does derive a part of such funds from contributions by his employees, except, in either case, any employee as to whom evidence of individual insurability is not satisfactory to the insurer. For the purposes of this paragraph, a union shall be deemed to be an employer and a member of a union shall be deemed to be an employee.

(iii) The policy must cover at least 10 persons at date of issue and not less than an average of 4 persons per employer unit; provided, that if the fund is established by an association of employers on behalf of its members, the policy may be issued only if (1) either (a) the participating employers constitute at date of issue at least 33-1/3 of those employer members whose employees are not already covered for group life insurance or (b) the total number of persons covered at date of issue exceeds 200; and (2) the policy shall not require that, if a participating employer discontinued membership in the association, the insurance of his employees shall cease solely by reason of such discontinuance.

(iv) The amounts of insurance under the policy must be based upon some plan precluding individual selection either by the insured persons or by the policyholder, employers, or unions.

APPENDIX E

CENTRAL NATIONAL LIFE INSURANCE COMPANY

A Legal Reserve Stock Company

JACKSONVILLE, ILLINOIS

(Herein called the Company)

Hereby Insures the Employees or Members of Western States Conference of Operating Engineers

(Herein called the Policyholder)

For the term of Three Years and agrees to pay the benefits hereinafter described, subject to all the terms and conditions hereinafter contained.

SCHEDULE OF BENEFITS

Master Group: Policy No. MMG1128	**Monthly premium rate guaranted for three (3) years**
Effective Date: January 1, 1971	**Premium Payment Method: Monthly**

SCHEDULE OF INSURANCE

Description of Class	Amount of Insurance
Class A (Member only)	As Designated on the Member's Enrollment Card and or by the Local Union. Note Attached Addendum
Class B (Member & Dependents)	

THE CONTRACT

This policy, the application of the Policyholder and the individual applications, if any, of the Employees or Members insured constitute the entire contract between the parties hereto. All statements made by or for the Employees or Members insured hereunder shall in the absence of fraud be deemed representations and not warranties, and no statement shall avoid any insurance hereunder or be used in defense of a claim unless it is contained in a written application. All agreements made by the Company are signed by its President, Vice President, Secretary or Assistant Secretary, and no other person can alter or waive any of the terms hereof or make any agreement which shall be binding upon the Company. No change in this policy shall be valid unless evidenced by amendment hereto signed by the Policyholder and the Company.

CONSIDERATION

This policy is issued upon the One Year Renewable Term Plan in consideration of payment of premiums in advance at the Home Office of the Company and it may be renewed by the Policyholder on the first and on each succeeding anniversary thereafter upon payment of the premiums then due, at such premium rates as may be determined by the Company. If on any renewal date the number of Employees or Members then insured hereunder should be less than 75% of the eligible Employees or Members, or if the whole number of Employees or Members then insured hereunder should be less than 50, the Company shall have the right to decline such renewal. The first contract year begins on effective date hereof and subsequent contract years shall begin on the same month and day of each year thereafter.

CONDITIONS, PROVISIONS AND BENEFITS

Part I—Eligible Risks

Each full time Employee or Member who is actively employed on the effective date of this insurance (and new Employees or Members) shall be eligible for benefits hereunder and shall become insured on the latest of the following dates:

(1) On the effective date hereof; or

(2) On the date the Employee or Member becomes eligible; or

(3) When he makes written request to the Policyholder for insurance hereunder; or

(4) On the date he returns to active duty if he is not regularly performing the duties of his occupation at the time of making written request; or

(5) Within thirty-one days of the date of employment or membership in the case of new Employees or Members;

Provided, however, the Company reserves the right to require satisfactory evidence of insurability (without expense to the Company) of any Employee or Member who makes written request for insurance more than thirty-one days after his date of eligibility.

Employees or Members age ..... or over are not eligible for insurance hereunder.

Part II—Premium Statement

The Company shall send the Policyholder (or his authorized representative) a premium statement not later than fifteen days in advance of the due date. The Policyholder or such representatives shall furnish on the Com-

pany's forms such information relative to new Employees or Members to be insured, adjustments because of changes in classification of Insureds, and termination of insurance as is necessary to enable the Company to prepare such premium statement, proper charges or credit shall be made in the succeeding statement. If any Insured has made proper written request for coverage his insurance shall not be invalidated by the Policyholder's failure, due to clerical error, to give proper notice to the Company of such Insured's request.

Part III—Grace Period

A grace period of thirty-one days following the due date shall be allowed the Policyholder or his authorized representative for the payment of any premium after the first after which this policy shall automatically discontinue if the premium be not paid, except that if the Policyholder shall have given the Company written notice of an earlier date of discontinuance, the policy shall discontinue as of such earlier date. The Policyholder shall be liable for the premium for any time the policy was in force during the grace period.

Part IV—Age

The ages referred to in the Policy shall mean ages nearest birthday.

Part V—Insurance Schedule

The Company agrees to pay an insurance benefit upon the death of an Insured in accordance with the schedule of optional methods of settlement, on page three herein.

Part IV—Calculation of Premiums

Premiums hereunder may be paid annually, semi-annually, quarterly, or monthly. All premiums are calculated on a monthly basis. Annual, semi-annual or quarterly premium rates are obtained by multiplying the monthly premium by 11.111, 5.777 and 2.944 respectively.

If premiums are payable annually, semi-annually, or quarterly, the premiums payable on any premium due date in any policy year shall be the sum of the individual premiums for the Employees or Members then insured on the basis of their attained ages nearest birthday as of the beginning of such policy year calculated by the Premium Rates in effect during such policy year. If premiums are payable monthly, the premium payable for the first month of each policy year shall be the sum of the individual monthly premium for the Employees or Members then insured on the basis of their then attained ages nearest birthday calculated by the Premium Rates then in effect.

Part VII—Copy of Application

Copy of the application upon which this policy is issued is attached hereto as a page immediately succeeding, at time of issue.

Part VIII—Incontestability

This policy shall be incontestable, except for non-payment of premiums, after two years from date of issuance.

Part IX—Reserve Basis

The reserve on this policy shall be computed upon the 1958 Commissioner's Standard Ordinary Table of Mortality which has interest at three (3%) per cent per annum.

The Certificate

The following Conditions, Provisions and Benefits which are part of this policy will be contained in a certificate which the Company will issue to the Policyholder for delivery to the Employee or Member insured hereunder:

CONVERSION PRIVILEGE

In case of termination of employment or membership for any reason whatsoever, or in case of termination of the Policy after it has been maintained in force for a period of five years, the insured shall be entitled to have a policy of Life or Endowment insurance issued to him by the Company without further evidence of insurability; provided:

(a) The amount of the policy shall not exceed the amount of the Insured's protection hereunder at the time employment or membership terminated;

(b) The policy shall be upon any one of the forms customarily issued by the Company;

(c) The policy shall require payment of the premium applicable to the class or risk to which the Insured belongs and to the form and amount of the policy at the Insured's then attained age;

(d) Written application for such a policy and payment of the first premium shall be be made by the Insured within 31 days after termination of insurance hereunder, during which time such insurance shall remain in force. If an Insured's death shall occur during the period within which such Insured would have been entitled to have a policy of life or endowment insurance issued to him by the Company and before such insurance shall have beecome effective,

the amount of life or endowment insurance which the Insured would have been entitled to have issued under such policy shall be payable, whether or not application for such insurance or the payment of the first premium therefor has been made.

If desired, the Company will issue said policy as of the original insuring age at the same date as the original insurance. In such event, the difference between the premiums for the amount of the insurance of the new policy from the date of the original insurance, calculated at the term rates contained in the Master Group Policy and the premiums that would have been required under the new policy, with interest at the rate of four (4%) per cent per annum, shall be paid to the Company.

MISSTATEMENT OF AGE

If the age of any Insured hereunder has been misstated, the insurance shall not be invalidated; but if the age has been understated, there shall be paid to the Company the difference between the premiums actually paid and the premiums which should have been paid at the correct age of the Insured for the full time such insurance has been in force, and if the age has been overstated, the Company shall refund the difference in premium without interest.

TERMINATION OF EMPLOYEE'S OR MEMBER'S INSURANCE

Insurance of the individual Insured hereunder shall terminate automatically (a) upon failure to pay any premium when due; or (b) if transferred to a class of Em-

ployee or Member not covered by insurance under the Master Group Policy; or (c) if employment or membership with the Policyholder terminates; or (d) if the said Policy is terminated; or (e) if, at any time, less than 50 lives or less than 75% of the eligible Employees or Members are insured under the Group, the Master Policy may be cancelled by the Company not later than the end of the then current policy year.

Cessation of active work by the Insured shall be deemed to constitute termination of employment, except that in the case of absence of the Insured from active work on account of sickness or injury or on account of retirement or for not longer than three months on account of leave of absence or temporary lay-off, the insurance on the Insured shall continue until the date premium payments in respect to such Insured are discontinued by the Policyholder, at which date the employment or membership of the Insured shall be deemed to have terminated.

OPTIONAL METHODS OF SETTLEMENT

The amount of any death benefit shall be paid according to that one of the following methods that shall be designated by the Insured, during his lifetime, or by the Beneficiary, after the death of the Insured:

FIRST: Payment in one sum. (This option shall be automatic if no other desigination is made) or,

SECOND: Payment in monthly installments (not less than $10) for a fixed period of years in accordance with the following table which shows the amount of monetary payments for each $1,000 insurance:

Years Payable	Monthly Installment	Years Payable	Monthly Installment
1	$84.28	5	$17.70
2	42.66	10	9.39
3	28.79	15	6.64
4	21.86	20	5.27

THIRD: Payment in installments of any fixed amount elected (not less than $10) until the amount of insurance with interest thereon at 2½% per annum is exhausted.

At the death of the beneficiary to whom a death claim is being paid under the second or third method, the present value of any unpaid installments under the second method computed on the basis of two and one-half (2½%) per cent interest per annum, or any balance of the fund under the third method shall be paid to the executors, or administrator or the beneficiary.

CHANGE OF BENEFICIARY

Any Insured insured hereunder may, by written request, designate a new beneficiary as often as desired. Such designation shall become effective only upon receipt of written request at the Home Office of the Company, accompanied by the certificate for endorsement.

EXTENSION OF DEATH BENEFIT

Upon receipt by the Company of due proof, in writing, that the death of the Insured occurred (a) prior to his sixty-fifth birthday, (b) within twelve months after termination of employment or membership or within a period after such termination of employment or membership equal

to the time during which the Insured's insurance was continuously in force within the period immediately preceding such termination of employment or membership, whichever may be the shorter period, and (c) while the Insured was totally disabled as a result of bodily injury or disease, so as to have been thereby prevented from engaging in any and every business or occupation and from performing any and all work for any form of compensation, and from performing any and all work for profit, and that such total disability had been continuous from the date on which the Insured's employment or membership terminated to the date of the Insured's death, the Company will pay, subject to the terms hereof, such amount of insurance as may have been in force on the life of the Insured on the date on which his employment or membership terminated; provided that such proof of such death and of such disability is received by the Company within one year after the date of such death, and provided further that the Master Group Policy is in full force and effect at the time of such death.

If an individual policy has been issued and has become effective pursuant to application made in accordance with the Conversion Privilege of the certificate, no payment shall be made under the provisions of the preceding paragraphs unless such individual policy is surrendered to the Company without claim thereunder, in which case the Company will refund to the Beneficiary under such individual policy the premiums paid thereon, with interest at the rate of four (4%) per cent per annum.

The designation of a Beneficiary under such individual policy other than the Beneficiary of record, hereunder, shall for the purpose of the Section and notwithstanding

the provisions contained in the Change of Beneficiary Clause in this cerificate effect a change of Beneficiary hereunder to the Beneficiary of record under such individual policy.

IN WITNESS WHEREOF, The Company has caused this contract to be executed at its Home Office in Jacksonville, Illinois, by its President and Secretary this 1st day of January, 1971, which is the effective date hereof.

.....

Secretary

.....

President

APPENDIX F

CENTRAL NATIONAL LIFE
Insurance Company

LIFE, ACCIDENT, HEALTH, HOSPITAL

1. APPLICATION is hereby made to the Company for Life, Accidental Death & Dismemberment insurance by:

Western Conference of Operating Engineers (*hereinafter called the Employer*) — Labor Union Operating Engineers (*Engaged in the business of*)

located at

.....

(Street Address) (City) (State)

on the lives of individuals who are eligible for insurance in accordance with the following conditions and for whom the required applications shall be furnished to the Company:

DESCRIPTION OF CLASS	WHEN ELIGIBLE
Class A—All Members Active & Retired	As determined by Local Unions and/or by Constitution and Bylaws
Class B—Member & Dependents	
Premium Rate $.26 per $500 Life and Accidental Death & Dismemberment—Note attached Addendum	

Note: (a) All applications by individuals on whom coverage is optional must be completed and forwarded to the Company within ninety days of the date upon which such individuals become eligible for insurance.

(b) Any individuals not actively at work for their Employer on the above dates of eligibility will not be eligible for insurance until their return to work in good health.

2. The Amount of Insurance for each individual is to be based on the following: Monthly Premium Rate Guaranteed for three (3) years.

SCHEDULE OF INSURANCE

Amount of Insurance	Description of Class
Class A—Member Only	Minimum of $500 Life & Accidental Death & Dismemberment
Class B—Member & Dependents	
Note attached Addendum	Maximum of $5,000 Life & Accidental Death & Dismemberment

3. The premiums are to be paid to the Company as follows:

(a) Annually, semi-annually, quarterly or monthly: Monthly

(b) Contributory or non-contributory basis: Non-Contributory
If contributory, contributions by employees are not to exceed $.....

4. The policy applied for herein is intended to replace or supplement any policy of Group or Wholesale Insurance now or previously carried in another Insurance Company, except as follows:

.....

5. It is desired that the insurance become effective on January 1, 1971, or as soon thereafter as the Company shall have received payment on account of the premium,

the required completed applications from at least 75% each Local Union of the eligible individuals (such applications to be not less than 25 in number) and the Company shall have approved this application and it is agreed that the insurance shall thereupon take effect in accordance with and subject to the contract to be issued to the Employer.

Dated at Phoenix, Ariz., this 15th day of January, 1971.

EMPLOYER

Western Conference of Operating Engineers

BY:

.....

President

.....

Secretary-Treasurer

APPENDIX G

WESTERN CONFERENCE OF OPERATING ENGINEERS

ADDENDUM

A. Central National Life Insurance Company will provide a Minimum of $500.00 Life, $500.00 Accidental Death and Dismemberment to a Maximum of $5,000.00 Life and $5,000.00 Accidental Death and Dismemberment, twenty-four (24) hour coverage for members of the listed local Unions that are associated and affiliated with the Western Conference of Operating Engineers, which are located in the states listed below:

Alaska	Idaho	Texas
Arizona	Montana	Utah
California	New Mexico	Washington
Colorado	Nevada	Wyoming
Hawaii	Oregon	Guam

B. Monthly premium rates are:
$.235 each $500. Life Insurance
.025 each $500. Accidental Death & Dismemberment
.26 for Dependent Coverage per family unit
Dependent coverage will not include Accidental Death and Dismemberment
Dependents will be entitled to fifty per cent (50%) Life Insurance only that Spouse has.

C. The designated amount of Life Insurance the Member will have will appear on an enrollment card and, or by, the Local Union.

D. Self-billing by each Local Union is acceptable.

E. There is no exclusion of Suicide under the Life Insurance Policy.

F. A Local Union may join on any monthly premium due date prior to July 1, 1971.

G. Payment. Lump sum only.

H. The Insurance Company will accept the Beneficiary designation of each Local Union as registered in their respective Local Union.

I. The Local Union will certify each death claim and that the Local Union will assume any and all resposibility in the event of fraud or mispayment.

J. Page 3 form GDD100 paragraph A under designation of individual insurance is deleted.

APPENDIX H

MEMORANDUM OF UNDERSTANDING

The undersigned agree:

1. That neither party surrenders or in any way modifies its position as to the validity or invalidity of that certain document numbered MMG1128.

2. a. The life rate is $1.00 per $1,000, effective October 1, 1971;

   b. The Accidental Death and Dismemberment rate is five cents (5¢) per $1,000, effective October 1, 1971;

   c. Dependent Life Rate is 85¢ per $1,000, effective October 1, 1971;

   d. The Company will accept any pending premiums at the prior rate; (It is the Company's position that the prior rate was unauthorized.)

   e. The Company will immediately resume processing all pending claims under the previous coverage; (It is the Company's position that the prior coverage was unauthorized.)

   f. To agree that the case is on a month-to-month basis until March 1, 1972, at which time the parties can mutually agree for an extended period, or to terminate the coverage. Both parties agree that coverage may be terminated prior to the date above referred to, viz., March 1, 1972, by written notice to the other party, registered or certified

mail, 12 o'clock midnight of the last day of the month following the month in which the notice is received.

Dated at Jacksonville, Illinois this 14th day of October, 1971.

CENTRAL NATIONAL LIFE INSURANCE COMPANY

By: .....

WESTERN STATES CONFERENCE OF OPERATING ENGINEERS

By: .....

LIBRARY
SUPREME COURT, U. S.

FILED
JAN 15 1975

In the Supreme Court of the United States

October Term, 1974

No. 74-841

CENTRAL NATIONAL LIFE INSURANCE COMPANY,

Petitioner,

vs.

INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL NUMBER 953, LOCAL NUMBER 392, LOCAL NUMBER 326, LOCAL NUMBER 370, LOCAL NUMBER 371, LOCAL NUMBER 490, LOCAL NUMBER 428 and LOCAL NUMBER 612,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

Respondents' Brief in Opposition

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Malcolm L. Shannon, Jr.

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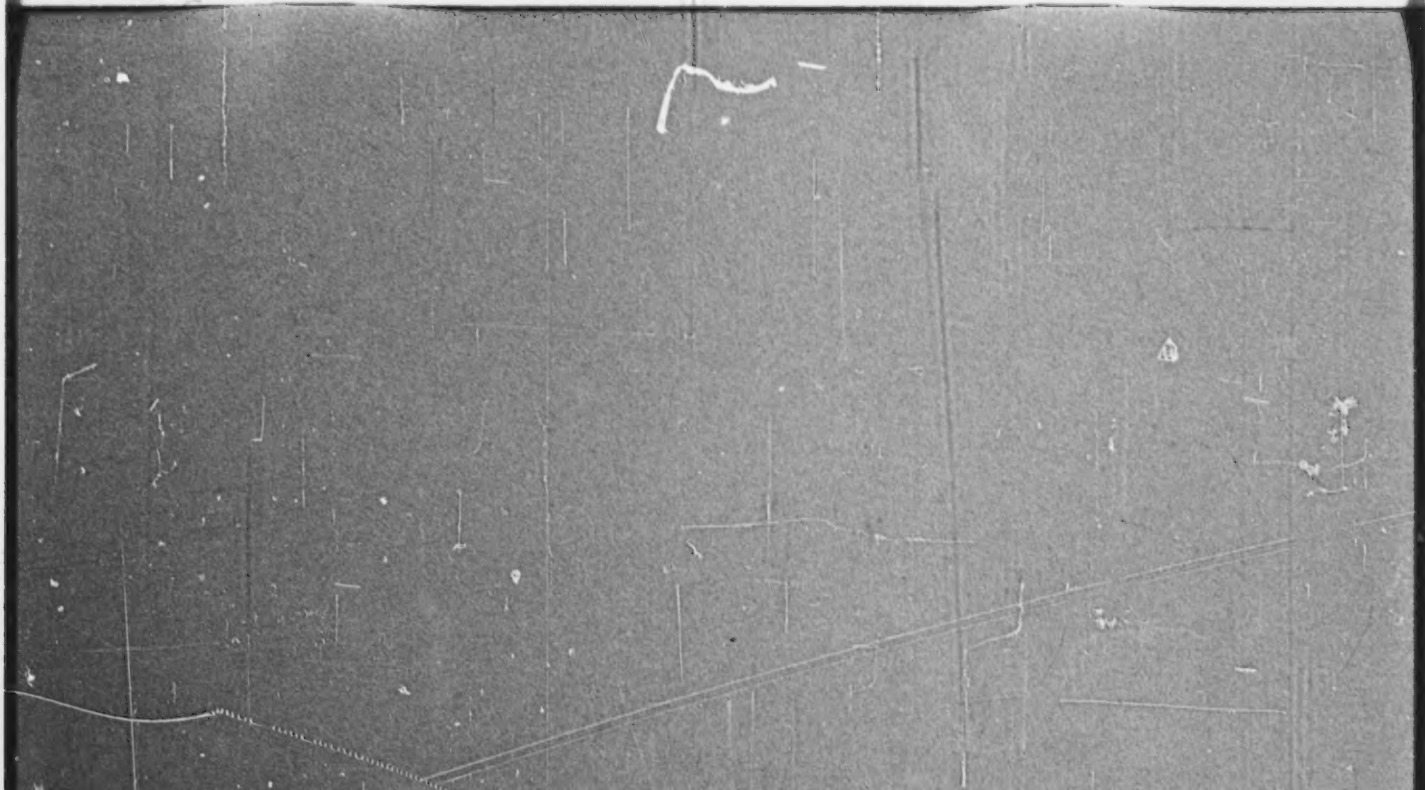
Counsel for Respondents



SUBJECT INDEX

Page

I.

QUESTIONS PRESENTED 2

II.

STATEMENT 2

III.

ARGUMENT 12

A. Ill. Rev. Stat. ch. 73, Sec. 842 (2) (e) is not applicable to MMG 1128 12

B. There is no evidence that the language of Ill. Rev. Stat. ch. 73 Sec. 842 (2) (e) was expressly incorporated into MMG 1128 16

C. Even if the petitioner could show the "75% requirement" in MMG 1128 was expressly incorporated from Ill. Rev. Stat. ch. 73 Sec. 842 (2) (e), only 75% of the individual members of each local union affiliated with the WCOE which chose to participate were required to be enrolled 17

D. Even if the Petitioner's arguments had intrinsic merit, Petitioner would be subject to the defenses of waiver and estoppel 18

IV.

CONCLUSION 19

INDEX OF AUTHORITIES

CASES

Page

Aetna Life Insurance Co. v. Rhodes, 170 F.2d 111 (10th Cir. 1948) 18

Bronson v. Washington 55 Ill. App. 2d 523, 202 N. E. 2d 172 (1965) 14

International Union of Operating Engineers 953 v. Central National Life Insurance Co. 501 F.2d 902 (10th Cir. 1974) 18

Midwest Triangle Paint Works v. Fireman's Insurance Company 36 Ill. App. 2d 65, 182 N. E. 2d 562 (1962) 19

U. S. v. U. S. Gypsum Co. 333 U. S. 364, rehearing denied, 333 U. S. 869 (1965) 18

STATUTES

29 U.S.C. Sec. 152 (5) 2

29 U.S.C.A. Sec. 186 (c) (5) 14

Ill. Rev. Stat. ch. 73, Sec. 842 (2) (e) 2, 12, 16, 17, 18, 19

Ill. Rev. Stat. ch. 73, Sec. 842 (2) (c) 15

SECONDARY AUTHORITIES

R. Eilers and R. Crowe, Group Insurance Handbook (1965) 14

In the

Supreme Court of the United States

October Term, 1974

No. 74-641

CENTRAL NATIONAL LIFE
INSURANCE COMPANY,

Petitioner,

vs.

INTERNATIONAL UNION OF OPERATING
ENGINEERS, LOCAL NUMBER 953, LOCAL
NUMBER 302, LOCAL NUMBER 326, LOCAL
NUMBER 370, LOCAL NUMBER 371, LOCAL
NUMBER 400, LOCAL NUMBER 428 and
LOCAL NUMBER 612,

Respondents.

On Petition for Writ of Certiorari to the United States
Court of Appeals for the Tenth Circuit

Respondents' Brief in Opposition

I
QUESTIONS PRESENTED

Respondents believe Petitioner inaccurately and prematurely set forth the Questions Presented. (Petition, at 2,3). Petitioner states, as a fact, that "[t]he language in Ill. Rev. Stat. ch. 73, Sec. 842 (2) (e) . . . [is] expressly incorporated into the insurance contract with respondents . . . ."

Such alleged incorporation has never been established by testimony or evidence in the proceedings below, thus the questions presented for review are:

A. Is Ill. Rev. Stat. ch. 73, Sec. 842 (2) (e) applicable to the Master Group Policy MMG 1128 (hereinafter referred to as "MMG 1128")?

B. If so, is the language in Ill. Rev. Stat. ch. 73, Sec. 842 (2) (e) expressly incorporated into MMG 1128?

C. If so, did the "75% enrollment requirement" mean that:

1. 75% of the individual members of each and every local union compromising the Western States Conference of Operating Engineers ("WCOE") must enroll or remain insured under MMG 1128, or

2. 75% of the individual members of each local union affiliated with the WCOE which chose to participate, must enroll or remain insured under MMG 1128?

D. Assuming A, B and C-1 above and that the Respondents did not meet the 75% enrollment requirements, did the Petitioner expressly or impliedly waive its right, pursuant to Illinois law, to terminate MMG 1128?

II
STATEMENT

Respondents, International Union of Operating Engineers Local Unions 953, 302, 326, 370, 371, 400, 428 and 612 ("Locals") are unincorporated associations and labor organizations as defined under 29 U.S.C. Sec. 152 (5) having their

principal places of business in the states of Arizona, Montana, New Mexico, Washington and Wyoming. (Finding of Fact No. 1, A. 23).[1] The Western States Conference of Operating Engineers ("WCOE") is a voluntary unincorporated association of local unions, including the Locals who are the Respondents in this case, organized for the purpose of assisting the Locals in solving common problems by serving as a clearing-house and functioning through a workshop type of method. (Pl. Ex. 5, R. 31, App. 1016; R. 93-94, 201, 339-340).[2] The Locals govern themselves as independent, autonomous organizations, WCOE has no power or control over the Locals and WCOE does not have the power to contractually obligate the Locals. (App. 62; R. 97, 122, 201-202, 339, 341).

The Petitioner, Central National Life Insurance Company ("CNL") is an Illinois life insurance company which was represented in the negotiation, issuance and administration of the policy contract involved in this case by its Group Vice-President, and by one of its General Agents. (Pl. Ex. 8, R. 365, App. 2047-2050; Pl. Ex. 10, R. 370, App. 2053-2066; App. 63, 64; R. 104, 117, 211-212, 215-216, 227, 330, 363-364, 370-371, 442).

At a meeting held on November 10, 1970, representatives of certain interested local unions unanimously agreed that the officers of WCOE were to continue efforts to gain information on group life insurance coverage which could be obtained by the local unions. (Finding of Fact No. 5, A. 24; Pl. Ex. 7, R. 346, App. 2046). Not all local unions in WCOE were interested in obtaining such coverage. (R. 213-214, 219-220, 244-245, 258, 384). The interested local unions were in hopes that insuring the lives of their individual members under the framework of a

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1 "A" refers to the appendix to the Petitioner's Petition for Writ of Certiorari.

2 "R" refers to the Record of the Transcript of Proceedings. "App." refers to the Appendix for Appellant prepared for the United States Court of Appeals for the Tenth Circuit.

single master group policy would enable them to obtain a cheaper premium rate than many of them were singly paying at that time, because of the larger number of lives insured. (R. 210-211, 269-270, 343, Pl. Ex. No. 6, R. 362, App. 2038). The Secretary-Treasurer of WCOE furnished identical census data on only the interested local unions to insurance companies interested in bidding the coverage. (R. 346-347, 349-350, 447-448). Those insurance companies included CNL and SAFECO Life Insurance Company ("Safeco"). The census data included, among other things, the number of members in each interested local union, the average and actual ages of its members, the insurance company which was presently writing its coverage, if any, the type of coverage then in effect and the premium rate then being paid. (Df. Ex. 14, R. 63, App. 1056-98). This census data specifically gave CNL notice of the premium rates being paid by the Locals *prior* to the time CNL quoted its rate to the Locals. There is no evidence to show that CNL requested claims experience on the interested local unions in WCOE. One of CNL's General Agents attended the November 10, 1970, meeting. (R. 104).

Following receipt of the census data, CNL's General Agent transmitted it to the Group Vice-President at CNL's home office in Jacksonville, Illinois. (R. 740-741). The Group Vice-President acknowledged by letter that he had reviewed it. (Pl. Ex. 81, R. 54, App. 4038). He gave the census data to one of the secretaries in the Group Department, and instructed her to compute the premium rate. (R. 744-746). The Group Vice-President had the responsibility and authority to compute and quote premium rates, to bind new coverage and to issue policy contracts for CNL. (R. 536-537, 699, 726-727, 729, 884-887; Pl. Ex. 201, R. 886, App. 4421-4423; Pl. Ex. 202, R. 884, App. 4427; Pl. Ex. 206, R. 888, App. 4441). This secretary had computed premium rates on approximately twenty-five other groups during the few months she had been employed under the Group Vice-President in the Group Department. (R. 744-746).

She computed rates in accordance with the Lincoln National Rate Manual as adopted by CNL's management. (R. 528-529, 728, 779, 890-891). She later testified that some of the census data furnished by the Locals had been used to quote the rate but that she could not recall if there had been "additional sheets" in it at the time she computed the rate (R. 762). No additional data was requested from the Locals by CNL (App. 64; R. 784, 168-169). The secretary computed a rate of 45c per $1,000 per member per month, and gave the rate sheets to the Group Vice-President and had nothing more to do with it. (R. 747-749; Pl. Ex. 210, R. 54, App. 4453-4460). CNL's expert witness testified that the secretary used the proper form from the Lincoln National rate manual in the proper way in figuring this rate. (R. 528-529). The rate sheets indicate the Group Vice-President applied a .83 volume discount and came up with a rate of 37c per $1,000. (R. 783). Both of CNL's expert witnesses said it was appropriate to use a discount factor on a group this size. (R. 529-530, 641, 647-648). The Group Vice-President then added 10c per $1,000 for a profit margin and arrived at the rate quoted of 47c per $1,000. (Pl. Ex. 210, R. 54, App. 4460; R. 783). Therefore, the rate charged by CNL was actually 10c per $1,000 higher than computed by the secretary and by the Group Vice-President.

Subsequent to the meeting of November 10, 1970, the General Agent of CNL received telegraphic authorization from CNL's Group Vice-President, to quote a 3 year guaranteed premium rate of 47c each $1,000 of life insurance coverage per member per month. He quoted the rate by letter to the Secretary-Treasurer of WCOE on December 14, 1970, and attached a copy of his telegraphic authorization. (Pl. Ex. 8, R. 365, App. 2047-2050).

On December 22, 1970, the interested local unions met to consider bids from several insurance companies. (R. 104, 211; Pl. Ex. 9, R. 368, App. 2051-2052). Those bids were narrowed down to the two lowest bids submitted by CNL and Safeco.

(R. 356-357). CNL's General Agent explained CNL's bid. CNL's bid at 47c was only a few cents lower than the Safeco bid for the basic coverage sought. (R. 213; Pl. Ex. 42, R. 360, App. 3015-3019). However, CNL's bid had certain other advantages, including a premium rate guaranteed for three years, (Pl. Ex. 1, R. 113, App. 1002; Pl. Ex. 2, R. 111, App. 1013). To verify the General Agent's authority to quote that rate, he was asked to have an officer of CNL available to once again meet with the interested local unions on January 15, 1971. (R. 117-118, 212, 227, 243-244, 441-442). Subsequent to the December meeting, draft copies of Master Group Policy MMG 1128, the master application and the addendum (all referred to as "MMG 1128") were furnished to the interested local unions by the General Agent and the Group Vice-President in order that their representatives could be prepared to discuss them at the January 15 meeting. (Pl. Ex. 10, R. 370, App. 2053-2066; Pl. Ex. 11, R. 370, App. 2067; R. 106-107, 369).

The General Agent and the Group Vice-President met with the interested local unions on January 15, 1971, and verified the three year guaranteed rate and the three year guarantee previously quoted. (App. 63; R. 117-118, 227, 330). They explained that CNL hoped to obtain additional insurance business from local unions in the west as a result of writing MMG 1128. (R. 215, 219; Pl. Ex. 182, R. 54, App. 4350). Certain amendments to the policy were made by the General Agent and the Group Vice-President at the request of the local unions, including an amendment requiring participation of only 75% of the eligible members "each local union" (R. 316-329, 108, 222-223, 381, 383, 117-118), because it was not possible to cover 75% of the local unions in the WCOE or 75% of the individual members of locals in the WCOE. (R. 324, 246, 438, 439, 457; Pl. Ex. 12, R. 376, App. 2069; Pl. Ex. 2, R. 111, App. 1013). Detailed discussions were held concerning the 3 year guaranteed rate and the coverage. (R. 118-119, 215-216, 356). The interested local unions passed a motion authorizing the

officers of WCOE to execute an application on behalf of the interested locals. (R. 122, 224, 474; Finding of Fact No. 6, A. 24).

Effective January 1, 1971, Defendant offered and made available its contract of insurance, MMG 1128, to local unions which were members of WCOE. A local could join on only monthly premium due dates prior to July 1, 1971. (Pl. Ex. 3, R. 112, App. 1014; Finding of Fact No. 7, A. 24). The Locals who are Plaintiffs in this case, between the dates of January 1, 1971, and July 1, 1971, each notified CNL of its election of participate under MMG 1128 from its business office in the state of its residence. (Finding of Fact No. 9, A. 25; App. 63-64; Pl. Ex. 53, R. 873, App. 1024; Pl. Ex. 83, R. 54, App. 4052; Pl. Ex. 125, R. 54, App. 4163; Pl. Ex. 143, R. 54, App. 4226). Premiums were paid by each Local from its business office. (App. 64). MMG 1128 provided any local in WCOE could apply to have its membership covered. Defendant mailed its acceptance of liability under MMG 1128 to each Local at its business office. (Finding of Fact No. 10, A. 25; App. 64; Pl. Ex. 54, R. 54, App. 1025; Pl. Ex. 84, R. 54, App. 4053; Pl. Ex. 114, R. 54, App. 4124; Pl. Ex. 124, R. 54, App. 4161; Pl. Ex. 142, R. 54, App. 4225; Pl. Ex. 161, R. 54, App. 4275; Pl. Ex. 175, R. 54, App. 4331; Pl. Ex. 176, R. 54, App. 4332). A copy of MMG 1128 was delivered by CNL through the mail to the business office of each Local in the state of its residence. (Finding of Fact No. 11, A. 25; App. 64; Pl. Ex. 16, R. 54, App. 2070-2073; Pl. Ex. 49. R. 54, App. 3036-3050; Pl. Ex. 139, R. 54, App. 4222; Pl. Ex. 162, R. 54, App. 4276; Pl. Ex. 166, R. 54, App. 4291; Pl. Ex. 181, R. 54, App. 4349). Locals possessed authority in accordance with applicable federal labor law and state insurance statutes and in accordance with their bylaws, minutes, and the custom and practice of their local unions to obtain, on behalf of their members and for their benefit, group life and accident insurance. (Finding of Fact No. 2, A. 24; App. 62, 63; R. 94, 91, 124, 201, 200, 225-227, 261-262, 273).

MMG 1128 provided on its face that the monthly premium

rates contained therein (in the application and in the addendum thereto) were "guaranteed for three (3) years" and that the policy was issued for a three year term subject to the policyholder having the option to renew each year on the anniversary date of the policy. (Pl. Ex. 1, R. 113, App. 1002; Pl. Ex. 2, R. 111, App. 1013 and R. 591-592). The premium rates were 47c each $1,000 (23.5c each $500) of life insurance coverage per member per month, 5c each $1,000 (2.5c each $500) of accidental death and dismemberment coverage per member per month, and 52c each $1,000 (26c each $500) for dependent coverage per family unit. (Pl. Ex. 3, R. 112, App. 1014).

Pursuant to said contract MMG 1128, the Plaintiff Locals accepted the coverage offered, notified CNL, and paid initial premiums to bind coverage, which premiums were accepted by CNL. In excess of 75% of the eligible members of each of Locals were enrolled under MMG 1128 (Unnumbered summary of per capita reports and premium reports for each local union prepared at request of trial judge, App. 2030-2037; stipulation at App. 64; Finding of Fact No. 20, A. 27). Thereafter, until CNL cancelled MMG 1128, Locals paid all premiums when due (Finding of Fact No. 16, A. 26). WCOE paid no premiums under MMG 1128 and had no responsibility to do so. (R. 387-388). CNL paid death claims pursuant to MMG 1128 until it ordered all pending death claim payments held up following its notice of cancellation. (Df. Ex. 32, R. 713, not included in App.).

MMG 1128 was the largest piece of group life insurance business ever written by CNL at that time. (R. 894). The new policy was reported to CNL's management, including its President, in daily New Business Reports (R. 829-835, 864, 893-895) submitted by the Group Department, headed by the Group Vice-President, and by the Agency Department, and in monthly IBM computer runs. (R. 786-790, 892-893). CNL's President testified that he carefully studied such reports (R. 892), and became aware of MMG 1128 perhaps as early as February, 1971. (R. 863-364). However, he did not actually look

at MMG 1128 until May of 1971. (R. 867).

CNL set up its files on MMG 1128 by local union and administered the coverage on a local-by-local basis. (R. 740; Df. Ex. 42, R. 66, not included in App.). The decision by CNL to accept or refuse liability under MMG 1128 was made separately for each local union at different times. This is evidenced by the fact that CNL refused coverage to Local Union 3, the largest local in WCOE because that local had not complied with conditions required before that local's coverage could become effective under MMG 1128. Local Union 3 had not enrolled 75% of its eligible members under MMG 1128. CNL refunded all premiums to Local 3 and Local 3 returned all death claims payments to CNL. (R. 814-827; Pl. Ex. 235, R. 817, App. 1055; although the court allowed relevant portions of this exhibit to be read into evidence, the trial court excluded the exhibit itself, R. 944-945). All other participating local unions, including the Locals in this case complied with MMG 1128 and their coverage became effective and was in force until unilaterally cancelled by CNL. (Conclusion of Law No. 10, A. 32). Finally, the trial judge ruled that testimony and evidence regarding its transactions with CNL were not admissable, as Local Union 3 is not a Plaintiff in this case. (R. 944-945, 715-717, 766-767).

In the early part of August 1, 1971 CNL became aware that death benefit claims paid pursuant to MMG 1128 began to exceed its expectations. (R. 703, 775). After the information regarding the loss ratio had been furnished to CNL's legal counsel, it was decided to write the letter of termination. (R. 704). On or about August 18, 1971, legal counsel to CNL, who is also the Senior Vice-President and a member of the Board of Directors, instructed the newly appointed Group Vice-President to cancel MMG 1128. (R. 703, 775). He sent notices of cancellation to the Locals. (Pl. Ex. 62, R. 54, App. 3059; Pl. Ex. 89, R. 54, App. 4057; Pl. Ex. 101, R. 54, App. 4091; Pl. Ex. 116, R. 54, App. 4125; Pl. Ex. 128, R. 54, App. 4178; Pl. Ex. 147, R. 54, App. 4250; Pl. Ex. 167, R. 54, App. 4292 and Pl. Ex. 183,

R. 54, App. 4351). The sole reason given for the cancellation was that "since the Presidential wage price freeze prevents us from increasing premiums, we have no other alternative other than to cancel the above contract effective September 1, 1971." (Finding of Fact No. 22, A. 27). The new Group Vice-President testified that legal counsel gave him no reason for the cancellation other than the claims were exceeding premiums by about two to one. (R. 703-704, 775). At that time, he was not aware and did not check to see if 75% of the eligible members of each participating local union was enrolled under MMG 1128. (R. 791). The President of CNL testified that it had no position on the validity or invalidity of MMG 1128 at the time of cancellation. (R. 909-913). No notice of cancellation was sent to WCOE. (Finding of Fact No. 23, A. 27).

After its notice of cancellation, CNL refused to pay death benefits on valid death claims to Locals' members as required by MMG 1128. (Finding of Fact No. 25, A. 27; R. 776). The total amount of unpaid valid death claims exceeded $175,000. (R. 793, 917). CNL refused to pay the pending claims until the Locals agreed to pay a premium rate higher than the three year guaranteed rate specified in MMG 1128. (R. 917-920, 138-144, 231-233, 280-281, 287-288, 414, 416-417, 429-430, 776, 793-794; Pl. Ex. 197, R. 793, App. 4417-4420; R. 880, 882).

On August 26, 1971, CNL decided to suspend the cancellation of MMG 1128 for two weeks. (Pl. Ex. 64, R. 54, App. 3061; Pl. Ex. 90, R. 54, App. 4058; Pl. Ex. 102, R. 54, App. 4092; Pl. Ex. 117, R. 54, App. 4126; Pl. Ex. 129, R. 54, App. 4179; Pl. Ex. 149, R. 54, App. 4252; Pl. Ex. 168, R. 54, App. 4293; Pl. Ex. 185, R. 54, App. 4353). A Memorandum of Understanding ("Memo") was signed between CNL and WCOE on October 14, 1971. (Pl. Ex. 4, R. 54, App. 1015). CNL agreed therein to "immediately resume processing all pending claims under the previous coverage" and the rate for life insurance was increased from 47c to $1.00 per $1,000 per member per month, effective October 1, 1971. The Memo expressly provided "that neither party surrenders or

in any way modifies its position as to the validity or invalidity of that certain document numbered MMG 1128." Plaintiff Local 953 refused to pay the higher premium rate. (Finding of Fact No. 27, A. 28). All other Plaintiff Locals paid the higher premium rate from October 1, 1971, until March 1, 1972. (Finding of Fact No. 26, A. 27).

The Locals' reason for complying with the Memo was to secure the payment of $175,000.00 in death claims withheld by CNL while not affecting the rights of the parties with respect to MMG 1128. (Finding of Fact No. 36, A. 29; R. 413-417, 429-430, 465-466).

After analyzing bids to determine the lowest rate available for replacement insurance, Local 953, effective October 15, 1971, entered into a contract with Hartford Life and Accident Insurance Company and the other Locals, effective March 1, 1972, entered into a contract with Safeco. (R. 289-294, 146, 154-158, 162, 398-399; Stipulation at App. 64). The replacement coverage provided the same death benefit coverage at a higher premium rate than had been provided under MMG 1128. Even though it was more expensive, the replacement coverage was not as desirable as the coverage under MMG 1128 because only a one year guaranteed premium rate could be secured as opposed to the three year guaranteed rate under MMG 1128. (R. 633).

The Locals then filed this lawsuit seeking damages in the exact amount of increased premium costs resulting from having to obtain replacement insurance coverage at a higher premium rate from October 1, 1971, for the remaining term of the three-year guarantee contained in MMG 1128 issued and prematurely cancelled by CNL. Damages were computed by Locals' expert witness, a qualified and experienced actuary. (R. 489-495).

CNL's President and new Group Vice-President testified that the worksheets used to compute the premium rate for MMG 1128 had not been examined by CNL until over one year after the

cancellation when the Locals took depositions pursuant to this lawsuit in CNL's home office in October, 1972. (R. 707, 883). Neither had anyone in CNL discussed the rate computation with the previous Group Vice-President or the secretary who performed the calculations prior to October, 1972. (R. 763, 778). Neither CNL's President or Group Vice-President, nor either of CNL's two expert witnesses were actually aware as to the exact data available to the secretary and the previous Group Vice-President when the rate was computed. (R. 500, 515, 778, 883, 891). The secretary was not certain. (R. 762-763). The previous Group Vice-President was not called as a witness.

Locals 953, 302, 326, 370, 371, 400, 428 and 612 have obtained judgment for the difference between the premium cost of MMG 1128, issued by CNL for a three-year term with its premium rate guaranteed for three years, and the increased premium cost for replacement coverage for the remainder of the three-year term of MMG 1128. The judgment was rendered on May 21, 1973 by the Honorable Edwin L. Mechem, United States District Judge, in the full amount of the amended prayer of the complaint. (A. 36). Judge Mechem rendered his decision after a trial which lasted for six days, consisting of the testimony of fifteen witnesses, in person and by deposition, and several thousand pages of exhibits admitted as evidence. On July 30, 1974, the United States Court of Appeals for the Tenth Circuit affirmed the judgment of the trial court. 501 F.2d 902 (10th Cir. 1974). Petition for rehearing was denied on August 27, 1974.

III
ARGUMENT

A. Ill. Rev. Stat. ch. 73, Sec. 842 [2] [e] is not applicable to MMG 1128.

CNL contends that the insurance contract MMG 1128 was governed by Ill. Rev. Stat. ch. 73, Sec. 842 (2) (e) (1973), ("Sec. 842 (2) (e)") which reads as follows:

"(2) The following forms of life insurance, in addition to those described in subsection (1), are hereby declared to be group life insurance within the meaning of this Article:

(e) Life insurance, written under a policy issued to one or more *trustees* of a fund established by an association of employers on behalf of its members, or by two or more employers in the same industry or by one or more labor unions or by one or more employers and one or more labor unions, which *trustees shall be deemed the policyholder,* covering employees of the employers or members of the unions for the benefit of persons other than the employers or the unions, subject to the following conditions:

(i) The persons eligible for insurance shall be all of the employees of the employers or all of the members of the unions, or all of any class or classes thereof determined by conditions pertaining to their employment, or to membership in the unions, or to both. The policy may provide that the term "employees" shall include retired employees . . . .

(ii) The premium for the policy shall be paid by the trustee or trustees wholly from funds furnished by the employer or employers of the insured persons. Such funds may be derived, at the option of each employer, in part from contributions by the employees insured. The policy must insure all eligible employees of each employer who does not derive any part of such funds from contributions by his employees and at least 75% of the eligible employees of each employer who does derive a part of such funds from contributions by his employees, except, in either case, any employee as to whom evidence of individual insurability is not satisfactory to the insurer. For the purposes of this paragraph a union shall be deemed to be an employer and a member of a union shall be deemed to be an employee. (Emphasis added.)"

It is clear from the language of subsection (e) that the subsection only applies when a life insurance policy is issued to the "trustees of a fund." In such event, the "... trustees shall be deemed the policyholder." Further, "[t]he premium for the policy shall be paid by the trustee or trustees . . . ." There were no trusts, trustees or fund involved in the issuance or

administration of MMG 1128. Moreover, MMG 1128 designates the policyholder to be the ". . . members of the Western States Conference of Operating Engineers." (Pl. Ex. 1, R. 113, App. 1002). The "members" of the WCOE are the local unions. (Pl. Ex. 5, R. 31, App. 1016; R. 201, 340, 93-94). The trial court found the contract was entered into by each local and CNL. (Finding of Fact No. 34, A. 29; Finding of Fact No. 7, A. 24). Premiums were paid by each local from its business office. (App. 64), not by a trustee or trustees.

Subsection (e) refers to what is popularly known as jointly administered Taft-Hartley Trusts created under Section 302 (c). (5) of the Labor Management Relations Act. 29 U.S.C.A. Sec. 186 (c) (5); *see* R. Eilers and R. Crowe, *Group Insurance Handbook* 618-32 (1965). The Illinois group life statutes are predicated on the National Association of Insurance Commissioner's ("NAIC") 1917 Model Act. R. Eilers and R. Crowe, *Group Insurance Handbook* 87 (1965). The NAIC Model Act classifies group life insurance coverage into four types, one of which is multiple-employer groups arising out of Taft-Hartley collective bargaining situations or similar arrangements. R. Eilers and R. Crowe, *Group Insurance Handbook* 915-18 (1965).

Further, the testimony of various representatives indicates these individuals recognized the distinction between a policy to be purchased by a trust and a policy to be purchased by a local itself. (R. 92, 120, 200).

Assuming, arguendo, that subsection (e) does apply to a policy issued to a non-trustee policyholder, CNL has still failed to show from the statutory language itself or legislative intent that the "75% requirement" of subsection (e) goes beyond a single policyholder and encompasses the situation wherein multiple policyholder exist under one master group policy. Absent clear legislative intent, the intent must be gleaned from the language of the statute itself. *Bronson v. Washington,* 55 Ill. App. 2d 523, 202 N. E. 2d 172 (1965). It appears that subsection

(e) is not directed at multiple policyholders.

The Respondents submit that Ill. Rev. Stat. ch. 73, Sec. 842 (2) (c) is the proper subsection governing MMG 1128:

> "(c) Life insurance covering the full privileged, voting contributing members of any association which has been in existence for at least one year, not formed for the exclusive purpose of procuring insurance, or life insurance covering the members of any labor union, *written under a policy issued to such* association or *union which shall be deemed to be the employer* for the purposes of this article, *the premium on such policy to be paid by the* association or *union* either from its own funds or from funds contributed by members or both, and insuring any of its members who are actively engaged in the same occupation, for amounts of insurance based upon some plan which will preclude individual selection, for the benefit of persons other than the association or union, or its officials. The term "association" or "members" may include employees of either. (Emphasis added)."

The trial court found that the contract was between CNL and the participating locals. (Finding of Fact No. 34, A. 29). Therefore the policy was issued to the locals, which local unions paid the premiums. (App. 64). Sec. 842 (c) does not proscribe or contain any participation requirement or limitation. Thus, applicable Illinois law does not contain the "75% requirement" which appears in MMG 1128. CNL argues Sec. 842 (c) is not applicable for the reason that it does not contain or express a "75% requirement." (Petition, 14). Respondents submit such argument is circular. The Petitioner must show that the alleged provision of the Illinois statutes containing the relied upon "75% requirement" is applicable to MMG 1128, not start from the "75% requirement" contained in MMG 1128 and dismiss all statutory provisions which do not happen to include a "75% requirement" as inapplicable.

Therefore, Ill. Rev. Stat. ch. 73 Sec. 842 (2) (e) is not applicable to MMG 1128 by its terms based upon the facts surrounding the issuance, policyholder and administration of MMG 1128.

B. There is no evidence that the language of Ill. Rev. Stat. ch. 73 Sec. 842 [2] [e] was expressly incorporated into MMG 1128.

Although CNL indicates that since the trial level it has strongly maintained MMG 1128 was governed by, Ill. Rev. Stat. ch. 73 Sec. 842 (2) (e), (Petition, 12), the present argument was never expressly raised until *after* the trial and judgment was entered. CNL never requested a Finding of Fact or Conclusion of Law specifically regarding the application of Sec. 842 (2) (e) or incorporation of any language thereof to or in MMG 1128. (Defendant's requested Finding of Fact and Conclusions of Law, App. 87-101; Supplemental Findings of Fact and Conclusions of Law, App. 102-107).

Although the evidence indicates ample and logical opportunities or occasions existed, both during negotiations and at the trial, for CNL to forward its position regarding the application and incorporation of the language of MMG 1128, it appears such was never attempted. For example, during the negotiations, the "75% requirement" was specifically discussed and modified in a meeting between representatives of CNL and the locals. (R. 381, 383, 222-223). The fact that not all the member unions desired to participate was also specifically discussed with CNL's representatives. (R. 219-220, 213-214). Petitioners presented no witness to testify that the alleged connection with Sec. 842 (2) (e) was ever specifically discussed or even mentioned by CNL's representatives during any negotiations with the locals. Likewise, during the trial, although CNL had two expert actuarial witnesses and its President, who is also an attorney, (R. 916) testify on its behalf, never once was

any attempt made to prove the alleged application or incorporation of the language of Sec. 842 (2) (e).

Further, Petitioner's legal counsel was involved in the events preceeding the cancellation of MMG 1128 (R. 704), yet the sole reason contained in the letters notifying the locals of CNL's action was that the presidential wage price freeze prevented CNL from increasing the premiums. (Finding of Fact No. 22, A. 27). It appears the true reason for cancellation was that the claims were exceeding the premiums. (R. 703-704, 775). Had it been CNL's intention to cancel MMG 1128 due to a suspected violation of the "75% requirement", it is reasonable to assume CNL would have inquired of its records in order to determine the actual participation or enrollment at that point in time. This was not done. (R. 791). In fact, as of three days after the letters of cancellation were sent to the locals, CNL had no official position regarding the validity or invalidity of MMG 1128. (R. 911-912).

Most invitingly, the trial court when finding the language of the Application and MMG 1128 regarding the "75% requirement" to be ambiguous, allowed extrinsic evidence in order to determine the intentions of the parties regarding such. (Finding of Fact No. 21, A. 27). CNL presented no evidence regarding Sec. 842 (2) (e).

No evidence was ever presented by CNL to substantiate that the "75% requirement" in MMG 1128 was related in any manner to Sec. 842 (2) (e). The record does seem to show CNL, despite ample opportunities to affirm or prove its present position that Sec. 842 (2) (e) is the true source of the "75% requirement" which appears in MMG 1128, was unable to do so.

C. Even if the petitioner could show the "75% requirement" in MMG 1128 was expressly incorporated from Ill. Rev. Stat. ch. 73 Sec. 842 [2] [e], only 75% of the individual members of each local union affiliated with the WCOE which chose to participate were required to be enrolled.

CNL has not shown either from the language of Sec. 842 (2) (e) itself or from legislative intent that the "75% requirement" is intended to be more inclusive than a single policyholder and thus encompass the situation, as in the instance, wherein multiple policyholders exist under one master group policy.

In light of the limited scope of Sec. 842 (2) (e), the trial court could nonetheless still find, as it did, the language of the application and MMG 1128 relating to the "75% requirement" to be ambiguous and allow the parties to present evidence of their construction thereof. (Finding of Fact No. 21, A. 27). It was determined that this language was intended by the parties to require membership by 75% of the eligible individuals of each participating local union which was a member of the WCOE and the parties so construed it. (Finding of Fact No. 21, A. 27). The Tenth Circuit Court of Appeals stated that this Finding is supported by substantial evidence and not clearly erroneous and would not be disturbed by them. *International Union of Operating Engineers 953 v. Central National Life Insurance Company,* 501 F.2d 902, 907 (10th Cir. 1974). Error is not presumed but must be affirmatively shown, *Aetna Insurance Co. v. Rhodes* 170 F.2d 111 (10th Cir. 1948). CNL has not affirmatively shown such error. A trial courts findings shall not be set aside unless clearly erroneous. *U. S. v. U. S. Gypsum Co.* 333 U. S. 364, *rehearing denied,* 333 U. S. 869 (1948).

Thus, even if CNL could show the "75% requirement" of Sec. 842 (2) (e) is that appearing in MMG 1128, the lower courts could correctly decide that only 75% of the individual members of each participating local were required to be enrolled.

D. Even if the Petitioner's arguments had intrinsic merit, Petitioner would be subject to the defenses of waiver and estoppel.

Under Illinois law, insurance provisions proscribed by statute may be waived, and the insurer, by its conduct, can be estopped

from asserting them. *Midwest Triangle Paint Works v. Fireman's Ins. Co.* 36 Ill. App. 2d 65, 183 N. E. 2d 562 (1962). Respondents contend the law set out in *Midwest* is applicable to the situation herein. Petitioners argue that *Midwest* requires a determination of the scope of the waiver. Respondents submit that *Midwest* is not so restrictive, but rather, indicates the large dimensions of the general rule. Just as a constitutional right may be waived so may an insurer wave a provision prescribed under a statute which is to its benefit. *Midwest* at 564-565. As an example of the dimension of the rule, even a provision stating no provision may be waived unless in writing attached to the policy may itself be waived by the insurer. *Midwest* at 564.

The locals paid the premiums due. (Finding of Fact No. 20, A. 27). CNL accepted these premiums and paid death claims pursuant to MMG 1128. (Df. Ex. 32, R. 713, not included in App.)

Assuming Sec. 842 (2) (e) to apply and nonwithstanding the apparent extent of the rule, it would appear that there is ample evidence in the record in view of the above authority to support the trial court's Conclusion of Law No. 24, (A. 34), regarding waiver and estoppel, which in itself inherently and logically carries with it a determination of scope.

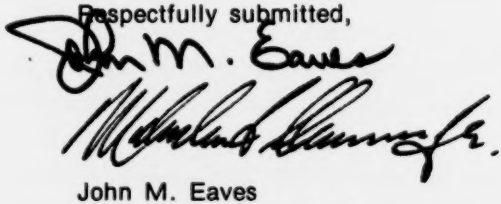
IV
CONCLUSION

The Court of Appeals, in affirming the judgment of the trial court, properly interpreted the application of Illinois statutory law and Illinois case precedents regarding the "75% requirement" appearing in MMG 1128 and the parties construction thereof. Further, the record amply supports the factual findings of the trial court comprising the context in which this case arose, about which the Court of Appeals exhibited no apparent misunderstanding.

Petitioner has not shown the issues presented in this case rise to the dignity of national concern, but rather, affect only the immediate parties.

Based upon the decision of the lower courts and the arguments and authorities presented herein, Respondents respectfully request the Petition for Centiorari be denied.

Respectfully submitted,



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